...RARY
...PREME COURT, U. S.

No. 638

Office-Supreme Court, U.S.
FILED
OCT 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

JAYS FOODS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and LOCAL UNION NO. 1, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD S. LANSING and
BERNARD M. KAPLAN,
33 North La Salle Street,
Chicago 2, Illinois,
Counsel for Petitioner
Jays Foods, Inc.

BLANKSTEN AND LANSING,
33 North La Salle Street,
Chicago, Illinois 60602,
Of Counsel.

INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Questions Presented For Review	2
Statement of the Case	6
Statutes and Regulations Involved	18
Reasons for Granting The Writ	18
Conclusions	51
Appendix A-1	1a
Appendix A-2	3a
Appendix A-3	4a
Appendix B	5a
Appendix C	10a
Appendix D	31a
Appendix E	34a
Appendix F	37a
Appendix G	46a

LIST OF AUTHORITIES CITED.

CASES.

American Federation of Labor v. *N.L.R.B.*, 308 U.S. 401, 408, 410-11, 60 S. Ct. 300, 84 L. Ed. 347 (1940) 20, 30, 48

Anchor Manufacturing Company v. *N.L.R.B.*, 300 F.2d 301, 302 (C.C.A. 5th—1962) 34, 35, 45

Boire v. The Greyhound Corporation, 84 S. Ct. 894, 896-97 (1964) 21, 33

Foreman & Clark, Inc. v. *N.L.R.B.*, 215 F.2d 396, 398 (C.C.A. 9th—1954); cert. denied 348 U.S. 887, 75 S. Ct. 207, 99 L. Ed 697 ..... 34, 38, 46, 47

PAGE

Leedom v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 21

Pittsburgh Plate Glass Co. v. *N.L.R.B.*, 313 U.S. 146, 154, 61 S. Ct. 908, 85 L. Ed. 1251 (1940) 21, 33, 48

Rockwell Manufacturing Co., Kearney Div. v. *N.L.R.B.*, 330 F.2d 795 (C.C.A. 7th—1964) 34

The Lufkin Rule Co., 147 NLRB No. 46 (June 5, 1964); reported in Vol. 4 CCH Labor Law Reporter, pp. 20,993-94 44

N.L.R.B. v. *A. J. Tower Co.*, 329 U.S. 324, 330-31, 67 S. Ct. 324, 91 L. Ed. 322 (1946) 36

N.L.R.B. v. *Capital Transit Co.*, 221 F.2d 864 (C.C.A., D.C.—1955) 34

N.L.R.B. v. *Capitol Greyhound Lines*, 140 F.2d 754 (C.C.A. 6th—1944) 34

N.L.R.B. v. *Dixie Shirt Co.*, 176 F.2d 969, 970-71 (C.C.A. 4th—1949) 40

N.L.R.B. v. *Falk Corporation*, 308 U.S. 453, 459, 60 S. Ct. 307, 84 L. Ed. 396 .....20, 31, 48

N.L.R.B. v. *Huntsville Manufacturing Co.*, 203 F.2d 430, 434 (C.C.A. 5th—1953) 34, 36

N.L.R.B. v. *Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (C.C.A. 10th—1964) 34

N.L.R.B. v. *International Brotherhood of Electrical Workers, et al.*, 308 U.S. 413, 415, 60 S. Ct. 306, 84 L. Ed. 354 (1940) 20, 31, 48

N.L.R.B. v. *La Salle Steel Co.*, 178 F.2d 829, 830 (C.C.A. 7th—1949); cert. denied 339 U.S. 963, 70 S. Ct. 996, 94 L. Ed. 1372 40

N.L.R.B. v. *Minnesota Min. & Mfg. Co.*, 179 F.2d 323, 325 (C.C.C. 8th—1950) 40

N.L.R.B. v. *Realist, Inc.*, 328 F.2d 840 (C.C.A. 7th—1964) 34, 46

PAGE

N.L.R.B. v. *Trancoa Chemical Corporation*, 303 F.2d 456 (C.C.A. 1st--1962) 34, 37

N.L.R.B. v. *Standard Transformer Co.*, 202 F. 2d 846 (C.C.A. 6th—1953) 34

STATUTES.

(Set forth in Appendix F)

Section 6, National Labor Relations Act (29 U.S.C.A., Sec. 156) 5, 35, 38

Section 8 (a) (1) (3), National Labor Relations Act (29 U.S.C.A., Sec. 158 (a) (1) (3)) 3, 4, 5, 17, 19, 20, 21, 39, 49

Section 8(a) (5), National Labor Relations Act (29 U.S.C.A., Sec. 158 (a) (5)) 4, 5, 19, 35, 45, 46, 49

Section 9 (c), National Labor Relations Act (29 U.S.C.A., Sec. 159 (c)) 31, 32

Section 9 (d), National Labor Relations Act (29 U.S.C.A., Sec. 159 (d) 2, 3, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29, 30, 31, 32, 33, 34, 42, 43, 48, 49, 51

Section 10 (e), National Labor Relations Act (29 U.S.C.A., Sec. 160 (e)) 29

Section 10(f), National Labor Relations Act (29 U.S.C.A., Section 160 (f)) 2, 17, 18, 19, 22, 29, 31, 43

Sec. 1009, Administrative Procedure Act (5 U.S.C.A., Sec. 1009) 5, 18, 36

RULES, REGULATIONS AND REPORTS OF THE NATIONAL LABOR RELATIONS BOARD.

Series 8 Regulations (Appendix to Title 29, U.S.C.A.):

Reg. Sec. 102.33 (b) 40
Reg. Sec. 102.67 (f) .....41, 43, App. F.
Reg. Sec. 102.69 .....37, App. F.
Reg. Sec. 102.70 37
Reg. Sec. 102.72 (b) 40

PAGE

14th Annual Report of National Labor Relations Board, p. 29, note 10 39

15th Annual Report of National Labor Relations Board, p. 82 40

20th Annual Report of National Labor Relations Board, p. 66 41

26th Annual Report of National Labor Relations Board, p. 74-75 40

LEGISLATIVE HISTORY REFERENCES.

(References to "Leg. History" are to Legislative History of The National Labor Relations Act, 1935, published by the National Labor Relations Board.)

House Report No. 969, 74th Congress, 1st Session (reported in Vol. II, pp. 2914-2930-31, Leg. History) 28

House Report No. 972, 74th Congress, 1st Session (reported in Vol. II, pp. 2960-61, 2977, Leg. History) 29

House Report No. 1147, 74th Congress, 1st Session (reported in Vol. II, pp. 3053, 3073, Leg. History) 29

Senate Report No. 573, 74th Congress, 1st Session 14 dated May 1, 1935 (reported in Vol. II, p. 2314, Leg. History) 22

Senate Committee Report dated March 11, 1935 (reported in Vol. I, pp. 1323, 1357, Leg. History) 23

Testimony of Senator Wagner before Senate Committee on March 11, 1935 (reported in Vol. I, pp. 1425-26, Leg. History) 24

Testimony of Senator Wagner before House Committee on March 13, 1935 (reported in Vol. II, pp. 2493-94, Leg. History) 25

PAGE

Remarks of Senator Wagner on Senate floor on May 15, 1935 (reported in 79 Cong. Rec. 7569; Vol. II, pp. 2331-32, Leg. History) 26, 30, 42

Further Remarks of Senator Wagner on Senate floor on May 15, 1935 (reported in 79 Cong. Rec. 7573; Vol. II, p. 2342, Leg. History) 26

Remarks of Senator Walsh on Senate floor on May 16, 1935 (reported in 79 Cong. Rec. 7658, Vol. II, p. 2370, Leg. History) 27, 43

Public Resolution No. 44, 73rd Congress (48 Stat. 1183; reported in Vol. I, pp. 1255B, 1256, Leg. History) 21, 22, 24, 26, 27, 28, 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

JAYS FOODS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and LOCAL UNION NO. 1, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Jays Foods, Inc., petitioner herein, petitions for a Writ of Certiorari to review the judgment order of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 5, 1964, dismissing for want of jurisdiction the Petition to Review theretofore filed on August 21, 1964 in said court of review by the petitioner. Said Petition to Review sought review of a certain order theretofore entered on the 11th day of August, 1964, by the

National Labor Relations Board, in proceedings on Objections to Conduct Affecting Results of Election by the respondent union, wherein the Board set aside a certain representation election, lost by the union, conducted under the auspices of the Board among the employees of the petitioner on October 9, 1963, and directed a new election.

OPINIONS BELOW

The judgment order of October 5, 1964 of the Court of Appeals for the Seventh Circuit, Appendix A-1, *infra*, p. 1a) contains no opinion, and is as yet unreported in the official reports. The decision and order of the National Labor Relations Board entered on August 11, 1964 (Appendix B, *infra*, p. 5a), adopting the Hearing Officer's findings, conclusions and recommendations, is reported at 148 N.L.R.B. No. 34. The Hearings Officers' Supplemental Report on Objections dated May 11, 1964, is unreported in the official reports of the National Labor Relations Board (Appendix C, *infra*, p. 10a), as is the Hearing Officer's original Report on Objections dated February 11, 1964 (Appendix D, *infra*, p. 31a), and the Order of Remand of the Board dated April 20, 1964 (Appendix E, *infra*, p. 34a).

JURISDICTION

The judgment order of the Court of Appeals was entered on October 5, 1964, dismissing for want of jurisdiction the petitioner's Petition to Review theretofore filed on August 21, 1964, with said court of review. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

The following questions are presented for review:

(1) Whether *and at what point* does a United States Court of Appeals have jurisdiction under Sections 9 (d) and 10 (f) of the National Labor Relations Act, as amended, to review an order and decision of the National Labor Rela-

tions Board setting aside a representation election lost by the union and directing a new election, where, as here, the grounds for setting aside the initial representation election is alleged conduct upon the part of the employer in connection with the election which, if true, would constitute unfair labor practices as a matter of law within the meaning of Section 8 (a) (1) and (3) of the NLRA; and where, as here, the Board denied the employer's repeated requests for a determination by the Board, concurrently with the hearing on objections to the election, of the "unfair labor practices" in effect charged as the basis for invalidating the initial representation election?

(2) Was it the intent of the Congress in enacting Section 9 (d) of the National Labor Relations Act, as amended, to only bar *anterior* judicial review of an order of the National Labor Relations Board directing an *initial* representation election; or was it the intent of Congress to also bar judicial review of an order of the Board, *subsequent* to the holding of a representation election, setting aside the results of said representation election and directing a new election?

(3) Where a majority of the employees in a proposed bargaining unit have, in a representation election conducted by the National Labor Relations Board, voted against representation by a particular union, and the National Labor Relations Board thereafter sets aside the results of such election and directs a new election on the grounds that the employer has allegedly been guilty of acts and conduct in connection with said election constituting, as a matter of law, unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, was it the intent of the Congress in enacting Section 9 (d) of the National Labor Relations Act, as amended:

(a) To permit the National Labor Relations Board to override the concept of "majority rule" and set aside the initial representation election, and order a new election, without an opportunity to obtain in the first instance judicial review of the propriety of the Board's order setting aside the initial election and directing a new election?

(b) To bar judicial review of the Board's order setting aside the initial representation election and directing a new election, until such time as the union wins a subsequent election and the employer refuses to bargain collectively in violation of Section 8(a) (5) of the National Labor Relations Act?

(c) To compel an employer to go through a second election with the prejudicial onus of presumed guilt upon the employer, however unwarranted, arising from the Board's order, without a prior opportunity to obtain judicial review of the propriety of the Board's order setting aside the initial representation election and directing a new election?

(d) To compel an employer to become a reluctant lawbreaker by refusing to bargain collectively in violation of Section 8(a) (5) of the National Labor Relations Act as a condition precedent to obtaining judicial review of the propriety of the Board's order setting aside the initial representation election and directing a new election?

(e) To limit judicial review of the Board's order setting aside the initial representation election and directing a new election only to those cases involving Section 8(a) (5) unfair labor practices, as distinguished from cases involving Section 8(a) (1) and (3) unfair labor practices?

(f) To burden the administrative processes of the National Labor Relations Board with the time consuming tasks of holding a new election and processing a Section 8 (a) (5) unfair labor practice proceeding against the employer, before permitting judicial review in the first instance of the propriety of the Board's order setting aside the initial representation election and directing a new election?

(4) Whether an order and decision of the National Labor Relations Board setting aside a representation election and directing a new election, based on alleged conduct amounting to unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act is subject to judicial review under the Administrative Procedure Act (5 U. S. C. A., Sec. 1009) and by reason of the due process clause of the Fifth Amendment of the Constitution of the United States, in view of:

(a) The lack of specific statutory authority and standards in the National Labor Relations Act, as amended, relative to the Board setting aside a representation election; and

(b) The total failure of the National Labor Relations Board to proscribe, pursuant to Section 6 of the National Labor Relations Act (29 U. S. C. A., Sec. 156), any rules and regulations "in the manner prescribed by the Administrative Procedure Act" setting forth specific administrative authority, standards and guideposts of conduct which would constitute grounds for setting aside a representation election?

STATEMENT OF THE CASE

A. The Representation Proceeding.

1. Pursuant to a petition filed on August 26, 1963, and a Decision and Direction of Election issued by the Regional Director of the National Labor Relations Board on September 23, 1963, an election by secret ballot was conducted under the direction and supervision of the Regional Director on October 9, 1963. The results of the election were as follows:

Approximate number of eligible voters in unit	216
Void ballots	4
Votes cast for participating union	84
Votes cast against participating union	116
Valid votes counted	200
Challenged ballots	8
Valid votes counted plus challenged ballots	208

2. The 8 ballots challenged were those cast by the so-called "floor-ladies", and were challenged by the Union on the alleged ground that these employees were "supervisors" within the meaning of the National Labor Relations Act.

3. The unit therefore deemed and designated as appropriate by the Board for the purposes of the representation election was as follows:

> "All production and maintenance employees of the Employer's Plant located at 825 East 99th Street, Chicago, Illinois, but excluding office clerical employees, truck drivers, driver salesmen, guards and professional employees and supervisors as defined in the National Labor Relations Act."

No issue is presented as to appropriateness of the unit designated by the Board.

4. On October 16, 1963, the Union (petitioner before the Board) filed its Objections to Conduct Affecting Results of Election, which Objections stated as follows:

"I. Employer illegal threats, promises, misrepresentations and appeals to racial prejudice."

"A. On one or more occasions between the time the Petitioner (Union) petitioned for an election herein the employer, through statements made by its supervision illegally threatened and misrepresented to groups of workmen within the voting unit during working hours that;"

"1. If the Petitioner (Union) won the forthcoming representation election, the employees of the Employer would be working only 2 and 3 days per week;"

"2. If the Petitioner (Union) won the forthcoming representation election, employees of the Employer would be laid off and specifically at the rate of 10 employees per week on the first shift and 5 per week on the second shift;"

"3. If the Petitioner (Union) won the forthcoming representation election, employees of the Employer would be laid off and replaced by members of the petitioning union;"

"B. On one or more occasions between the time Petitioner (Union) petitioned for an election herein, the employer, through statements made by its supervision, illegally threatened, misrepresented, and attempted to appeal to racial prejudice by advising groups of white female workers that if the Petitioner (Union) won the forthcoming election that the Employer would be required to hire colored female workers."

"II. Illegal votes cast in election."

"The Petitioner (Union) reasserts challenges duly made at the time of the election herein and maintains that foreladies Mary Stamborski and Marie Jenkins illegally cast ballots in the subject election on the basis that at the time of the election said individuals were supervisors within the meaning of the National Labor Relations Act."

5. On December 13, 1963, the Regional Director issued his Supplemental Decision, pursuant to which a Hearing Officer was appointed for the purpose of conducting a hearing with regard to the Union's objections Numbers 1-A-3 and 1-B, and directed to prepare a report containing resolutions of credibility of witnesses, findings of fact and recommendations as to the disposition of the said objections.

6. The Regional Director's Supplemental Decision of December 13, 1963 sets forth the following disputed illegal threats allegedly made by Mr. Japp in a speech delivered by him to employees on October 7, 1963, two days before the election; to-wit, that if the Union got in or won the election:

1) The Company would discontinue giving employees $100 for the birth of a new child;

2) That the Company would no longer give a Christmas bonus or Christmas gift;

3) That the Company would no longer give free meals to employees;

4) That employees would no longer get profit sharing benefits;

5) That he (Mr. Japp) would close the plant down because it belongs to him;

6) The Union would bring employees in from other plants with more seniority, thus causing some of the employees in the voting unit to lose their jobs;

7) They (the employees) would be forced to attend and march in Union parades, otherwise they could be fined as high as $25 and further that the Union could have charitable donations deducted from their checks.

Said Supplemental Decision also sets forth the alleged charge, in connection with the Union (Objection I-B, that "several of Petitioner's (Union) witnesses, all white female, stated that they were told by their foreladies, whom Petitioner (Union) alleges to be supervisors within the meaning of the Act and all of whom were challenged on the ground of supervisory stature, that if the Union got in, the Union would require the Company to hire colored women."

All of these charges, as the Supplemental Decision of December 13, 1963 points out, were denied by the employer.

7. On January 2, 1964, prior to the hearing and taking of evidence in this cause by the Hearing Officer, the employer-respondent (petitioner herein) filed with the Regional Director a verified Answer and Petition to the Union's Objections, denying all the charges made in Petitioner-Union's Objections, and stating:

> "That the alleged 'illegal threats, promises, misrepresentations', etc., charged in petitioner's Objections, would, if true, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C.A., Sec. 158(a)(1) and (3)), and respondent requests, concurrently and in conjunction with the hearing on petitioner's Objections to the conduct of said election, a hearing and determination as to whether or not the respondent committed the unfair labor practices in effect charged by said Petitioner's Objections;" and

requesting "a specific finding that the respondent has not committed the unfair labor practices in effect charged by said petitioner's Objections."

On January 10, 1964, the Regional Director denied said employer-respondent's Petition aforesaid.

8. On January 14, 1964, at the opening of the hearing before the Hearing Officer, by way of preliminary oral motions before the taking of evidence, counsel for the employer-respondent again renewed its motion for a hearing and determination, concurrenty and in conjunction with the hearing on Objections, as to whether or not the employer committed any of the unfair labor practices in effect charged by the Union's Objections, and made the further motion that "the unfair labor charges which are involved in the objections and tne objections themselves" be heard by a Trial Examiner authorized to hear all of the issues involved. This on the ground, as asserted by counsel for the employer-respondent, that the Union's failure to identify as and pin the label of "unfair labor practices" on the alleged "illegal" conduct of the employer-respondent set forth in the Union's Objections and in the Supplemental Decision of the Regional Director of December 13, 1963, should not blind the National Labor Relations Board to the realities and true nature of the Union's Objections, to-wit, that the grounds and facts alleged by way of objections, would, if true, constitute "unfair labor practices" as a matter of law within the meaning of the NLRA, and that the Union's intentional failure to pin the label of "unfair labor practices" on the charges made against the employer-respondent was intended to deny and frustrate the due process right of judicial review available to the employer-respondent in representation cases where unfair labor charges are involved. (Rep. of Proceedings, p. 11-16).

Said oral motions were denied by the Hearing Officer. (Rep. of Proceedings, p. 15-16).

At the close of the evidence, said motions were again renewed by counsel for the employer-respondent, and again denied by the Hearing Officer (Rep. of Proceedings, p. 1007-1009).

9. The hearing was held before the duly designated Hearing Officer over a period of five days (January 14, 16, 17, 21 and 22, 1964), and the Official Report of Proceedings of said hearing consists of 1,063 pages, plus exhibits. Seven witnesses testified on behalf of the petitioner Union, and thirteen (13) witnesses were called by the employer-respondent.

10. The Hearing Officer's Original Report and Recommendations On Objections to Election, filed on February 11, 1964, made no attempt whatsoever to examine and compare the testimony of the various witnesses for purposes of weighing veracity and credibility, and completely failed to disclose and mention the repeated contradictions and inconsistencies in and impeachable nature of the Union's witnesses. The *only* findings of fact made by the Hearing Officer in his original Report, based on a Report of Proceedings containing 1,063 pages and the testimony of 20 witnesses, are those contained in the following three (3) short paragraphs contained in the Hearing Officer's original Report:

> "In the afternoon of October 7, 1963, Leonard Japp, the company president, made a speech to a gathering of employees. During the course of that speech, Mr. Japp notified the employees of various benefits they had received from the Employer. Mr. Japp mentioned the Christmas bonus, the free meals, and the $100 child bonus. He notified the employees that should the Union get in, all of these benefits would be taken away."

"During the course of this same speech, Mr. Japp notified the employees of the obligations they would incur as union members. He stated that the employees would be required to participate in union parades, and to be fined for failure to do so. He stated that union deductions would be made from the pay of the employees, and the employees would not know the purpose of the deductions nor would they be able to say anything about them."

"Mr. Japp informed his employees that should the Union become their representative, the employees would be subject to replacement by employee-union members of other employers."

Based on these findings, the Hearing Officer "concluded that the remarks of the Employer at the afternoon speech of October 7, 1963, interfered with the free choice of the employees in the election of October 9, 1963," and "recommended that the petitioner's Objection No. 1A-3 be sustained and a new election be ordered."

11. On February 18, 1964, the petitioner employer (respondent below) filed its Exceptions to the Hearing Officer's original Report and Recommendations on Objections to Election.

12. On March 2, 1964, the Regional Director for the Thirteenth Regional issued his Second Supplemental Decision and Direction of Second Election, adopting the Hearing Officer's finding and recommendations, setting aside the election conducted on October 9, 1963, and directing that a second election be held herein.

13. Thereafter, on March 11, 1964, the employer filed a Petition for Review with the National Labor Relations Board, Washington, D. C., pursuant to the provisions of the National Labor Relations Act and of Section 102.67 and 102.69 of the Regulations of the National Labor Relations Board.

14. On April 20, 1964, the National Labor Relations Board, Washington, D. C., entered an Order finding:

> ". . . that the report of the Hearing Officer did not, contrary to the directions of the Regional Director, discuss and resolve questions of credibility, make adequate findings of fact and recommendations as to the disposition of the issues herein;"

and remanded the proceedings "to the aforesaid Hearing Officer to prepare and serve upon the parties a supplemental report containing a discussion of credibility issues and resolutions thereof, together with the reasons therefor, and to make adequate findings of fact and recommendations to the Board as to the disposition of the issues herein."

Said order of remand of April 20, 1964, directed the filing of the Hearing Officer's Supplemental Report with the Board in Washington, D.C., and granted 10 days for the filing of exception thereto.

15. On May 11, 1964, the Hearing Officer issued his Supplemental Report on Objections and recommended that the union's Objection's IA-3 and IB be sustained, and that the election of October 9, 1963 be set aside, and a new election held.

Said Hearing Officer's Supplemental Report on Objections makes the following specific findings and conclusions:

1. Mr. Japp's Day Shift Speech:

That Mr. Leonard Japp, the president of the petitioner-employer company, in connection with his afternoon or day shift speech to employees on October 7, 1963, stated:

(a) "That should the union win the election, the employees would be subject to replacement by senior employees from other plants, and would as

union members, have the obligation to parade at the request of the union or suffer a fine."

(b) "That Mr. Japp informed the employees that sums would be deducted from their paychecks without their knowledge or consent, should the union win the election."

(c) "That Mr. Japp told his employees that the profit sharing and the Christmas bonus would be lost should the union become their representative."

(d) "That Mr. Japp notified his employees that should the union win the election, they would lose the cafeteria or free lunches."

The Hearing Officer's Supplemental Report on Objections found and concluded that the alleged statements set forth in subparagraphs (a) and (b) above "constitute material misrepresentations and because of the timing, two days before the election, the Petitioner (Union below) is prevented from making a substantial reply," and that the alleged statements set forth in subparagraphs (c) and (d) "tend to interfere with the free choice of the employees in the election of October 9, 1963."

II. The Alleged Interrogation:

That Mr. Japp "on the day of the election, in front of the cafeteria where the polling was to take place," approached an employee Alton Puryear, and asked said employee "if he was going to be with him," and that said employee responded "yes", and that this constituted an interrogation of an employee regarding his exercise of the vote, and tended to interfere with the free exercise of the vote in the election and constitutes an additional ground for setting the election aside.

III. Mr. Japp's Evening Speech:

That Mr. Japp, in connection with his evening speech to employees on October 7, 1963, said:

(a) "That if the union came into the plant, the employees would lose their free meals, $100

child bonus, and Christmas bonus, and that the cafeteria would probably have to be turned into a supply room."

(b) "That Mr. Japp notified the employees that they could be replaced by employees from other plants who were already in the union;"

and "that these comments by Mr. Japp interfered with the free choice of the employees in the election of October 9, 1963."

IV. Supervisory Status of the Floorladies:

That the eight (8) floorladies, all of whose votes were challenged at the election, were supervisors within the meaning of Section 2 (11) of the NLRA.

V. Alleged Appeal to Racial Prejudice:

That a floorlady, Marie Jenkins, "informed employees that should the union win the election, the Employer would hire female Negro employees, and the employees would have to work with them," and "that this appeal to racial prejudice tends to interfere with the free choice of the employees in the election and constitutes an additional ground for the setting aside of the election."

16. On May 20, 1964, the employer filed with the National Labor Relations Board, Washington, D.C., its exception to the Hearing Officer's Supplemental Report on Objections, and on June 19, 1964, with leave first granted by Board, its timely Supplement to its Petition for Review.

17. On August 11, 1964, the National Labor Relations Board entered an Order adopting all of the Hearing Officer's findings, conclusions and recommendations that Objections I-A and I-B be sustained, set aside the election held on October 9, 1963, and directed that a new election be held.

18. On August 21, 1964, the petitioner filed in the United States Court of Appeals for the Seventh Circuit,

its Petition to Review the Board's order of August 11, 1964.

19. On August 25, 1964, the petitioner filed with the Court of Appeals its motion to stay the order of the National Labor Relations Board pending judicial review of this cause by that court.

20. Thereafter, the National Labor Relations Board filed its objections to petitioner's Motion to Stay the order of the National Labor Relations Board of August 11, 1964, and also moved to dismiss the Petition for Review for alleged want of jurisdiction upon the part of the Court of Appeals.

21. On September 2, 1964, petitioner filed its Objections to the motion of the National Labor Relations Board to dismiss the Petition to Review, and was granted leave to file its printed brief in support of its objections to the motion to dismiss. Said petitioner's brief, dealing exclusively and exhaustively with the jurisdictional questions here presented, was filed on September 16, 1964.

22. On October 5, 1964, the Court of Appeals entered its judgment order, *without any written opinion in support thereof,* dismissing for want of jurisdiction the Petition to Review theretofore filed in said court of appeals by the petitioner. It is to review said judgment order of October 5, 1964 of the Court of Appeals that the present Petition for a Writ of Certiorari is herein brought.

23. Pursuant to an order entered on October 9, 1964 (Appendix A-2), as amended by an order entered on October 23, 1964 (Appendix A-3), the Court of Appeals has, in accordance with Rule 28 of the Rules of the United States Court of Appeals for the Seventh Circuit, stayed the mandate of that court for a period of 30 days from October 9, 1964, and continued in full force and effect until 30 days from October 9, 1964, the prior order of the

Court of Appeals, entered on September 2, 1964, staying further action by the National Labor Relations Board.

24. The attention of this Court is directed to the fact that the National Labor Relations Board has never filed with the United States Court of Appeals for the Seventh Circuit the Transcript of Record and Proceedings had before the Board. All pertinent written pleadings, orders and decisions in the proceedings before the Board, exclusive of exhibits, are reproduced as exhibits in the appendix to petitioner's printed Petition to Review filed with the Court of Appeals, a certified and nine copies of which Petition to Review has been filed with this Court as part of the record transmitted by the Clerk of the Court of Appeals.

B. The Basis For Jurisdiction Of The Court Of Appeals.

It is the position of the petitioner that the Court of Appeals has jurisdiction *to now* review the order entered by the National Labor Relations Board on August 11, 1964, setting aside the representation election held on October 9, 1963, and directing a new election, pursuant to the provisions of and by reason of:

(a) Title 29, Sections 159 (d) and 160 (f) U.S.C.A. (Section 9 (d) and 10 (f) of the National Labor Relations Act, as amended), by reason of the fact that the alleged acts and conduct set forth by way of Objections to Conduct Affecting Results of Election filed and instituted by the Union, and the findings of fact and determinations made by the Board relative to petitioner-employer's conduct affecting the results of the representation election lost by the Union, in effect charge the petitioner-employer with the commission of unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act (29 U. S. C. A., Sections 158 (a) (1) and (3); particularly where, as here, the petitioner, by

written and oral motions, prior to the hearing of said Objections by the Hearing Officer, and again at the close of the evidence in connection with said hearing, repeatedly requested the National Labor Relations Board for a hearing and determination, before a Trial Examiner, concurrently and in conjunction with the hearing on said Objections to the election, of the unfair labor charges which petitioner claimed were in effect charged in the Union's Objections to the Election, and in effect charged in the Regional Director's Supplemental Decision and Notice of Hearing issued December 13, 1963; and where all of said petitioner's motions were denied by the Board.

(b) Title 5, Section 1009, et seq. of U. S. C. A. (commonly known as the Federal Administrative Procedure Act), which provides for judicial review of decisions and determinations of administrative agencies.

(c) The findings and determinations of the Board deprive the petitioner employer, under the circumstances of the instant case, of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and Rules and Regulations of the National Labor Relations Board are set forth in Appendix F, *infra,* pp. 37a-45a.

REASONS FOR GRANTING THE WRIT

The precise jurisdictional issues involved in the instant cause present for the first time questions of utmost importance, *never before directly passed upon by this Court,* relating to the right to *immediate* or *current* judicial review under Sections 9 (d) and 10 (f) of the National Labor Relations Act, as amended, in those representation cases where the National Labor Relations Board sets aside a Board conducted representation election lost by the Union and directs a new election, on grounds of alleged con-

duct upon the part of the employer in connection with said election which, if true, would constitute unfair labor practices as a matter of law within the meaning of Section 8 (a) (1) and (3) of the Act.

The jurisdictional isues here presented are to be distinguished from the present accepted jurisdictional ex post facto method and practice, recognized by the various Courts of Appeal and accepted by the Board, of deferring and obtaining judicial review of an order of the National Labor Relations Board setting aside a representation election and directing a second election until and only after the holding of second election won by the Union, the proecssing by the Board of a Section 8 (5) unfair labor practice charge against the employer for refusing to engage in collective bargaining, and the filing by the Board of a petition for enforcement in the Court of Appeals.

It is the position of the petitioner that it was never the intent of Congress in enacting Sections 9 (d) and 10 (f) of the National Labor Relations Act, as amended, or of the Supreme Court of the United States in interpreting these provisions, to deny *immediate* or *current* review by the Courts of Appeal of an order by the Board setting aside a representation election lost by the union and directing a new election, where the grounds for setting aside such an initial election are alleged acts and conduct upon the part of the employer in connection with said election, which, if true, would constitute unfair labor practices as a matter of law within the meaning of Section 8 (a) (1) and (3) of the Act.

Nor, it is further respectfully submitted, was it the intent of the Congress, or of this Court for that matter, to limit judicial review in representation proceedings under Sections 9 (d) and 10 (f) of the National Labor Relations Act, as amended, only to representation cases involving Section 8(a) (5) unfair labor practices to the exclusion of

representation cases involving Section 8 (a) (1), (2), (3) and (4) unfair labor practices in connection with the election.

It is suggested by the petitioner that the National Labor Relations Board has encrusted the early Supreme Court decisions of a quarter of a century ago first interpreting Section 9 (d) of the Wagner Act (*i.e., American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940); *N. L. R. B.* v. *I. B. E. W.*, 308 U. S. 413, 60 S. Ct. 306, 84 L. Ed. 354 (1940); and *N L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 60 S. Ct. 307, 84 L. Ed. (1940).) with a catch-all meaning and barrier to judicial review *not intended either by the Congress or this Court.*

It is also respectfully suggested that the definitive judgment of this Court has long been needed and is overdue on the jurisdictional issues herein presented, and that this Court, having due regard for the clear congressional intent reflected in the legislative history and background of Section 9 (d) of the Act, and the due process function of judicial review, should define once and for all and with finality the question of judicial review, and the implications flowing therefrom, in those representation cases where, as here, an election having been duly held and lost by the Union, the Board sets aside the will of the majority of the employees, as expressed in said election, on grounds which, if true, would amount to unfair labor practices upon the part of the employer within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended.

While this Court has, (in *American Federation of Labor* v. *N.L.R.B., supra, N.L.R.B.* v. *I.B.E.W., supra,* and *N.L.R.B.* v. *Falk Corp., supra;* all of which cases involved attempts to obtain *anterior* review of a Board's order directing an *initial* representation election *before* the holding of such an election) spelled out the Congressional intent and historical policy purpose of Section 9 (d) of the Act to

bar *anterior* review of an order of the National Labor Relations Board directing an *initial* representation election, and has (in *Pittsburgh Plate Glass Co.* v. *N.L.R.B* 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251 (1941)) held that a ruling of the Board determining the appropriate unit for bargaining is subject to judicial review when a complaint of unfair labor practices is predicated upon the ruling, *it has never had occasion to construe Section 9 (d),* in the light of its legislative history and purpose, *in those representation cases where an initial representation election having been held the Board sets aside such an election, and directs a new election,* on grounds constituting unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

Nor does the recent case of *Boire* v. *The Greyhound Corporation,* 376 U. S. 473, 84 S. Ct. 894 (1964), which holds that the District Courts have no plenary right of review in certification proceedings, or *Leedom* v. *Kyne,* 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1959), purport to directly deal with the jurisdictional issues presented by the instant cause.

The Congressional Intent Relative To Sections 9 (d) And 10 (f) Of The National Labor Relations Act, As Amended, As Expressed In The Legislative Background And History Of Said Provisions.

Historically, Section 9 (d) of the National Labor Relations Act was adopted by the Congress to overcome the difficulty created by Public Resolution No. 44, 73rd Congress (48 Stat. 1183), adopted on June 19, 1934, which directed the President to establish a board authorized to investigate issues, practices and activities of employer or employees in controversies arising under Section 7(a) of the National Industrial Recovery Act of 1933 (NRA).

Said Public Resolution No. 44 (reported in Vol. I, at pages 1255 B and 1256, *Legislative History of the National Labor Relations Act, 1935*) granted authority to such Board (the predecessor of the NLRB) to order and conduct representation elections by secret ballot, and provided that "any order issued by such board" (including, presumably, an election order) may be reviewed in the same manner "as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act."

A careful review of the Senate and House Committee Reports, and of the hearing and debates on the floor of Congress, in connection with the adoption of Sections 9 (d) and 10 (f) of the National Labor Relations Act of 1935, clearly indicates and reflects the Congressional intent to only bar *anterior* review, by reason of the problems encountered under Public Resolution No. 44, of orders of the National Labor Relations Board directing an *initial* election.

Senate Report No. 573, 74th Congress, 1st Sess. 14, dated May 1, 1935 (reported in *Legislative History of the National Labor Relations Act, 1935,* Vol. II, at page 2314, published by the NLRB) discusses the purpose of Section 9 (d) of the then proposed National Labor Relations Act (Senate Bill No. 1958) in the following language:

> "Section 9 (d) makes it absolutely clear that there shall be no right to court review *anterior* to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the right of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. *But if subsequently the Board makes an order predicted upon the election,* such as an order to bargain collectively with elected representatives, *then the entire election procedure becomes part of*

the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." (Emphasis ours)

In a Report of the Senate Committee on Education and Labor dated March 11, 1935, comparing Senate Bill No. 1958 of the 74th Congress (which became the basis of the NLRA as finally adopted) with a prior Senate Bill No. 2926 of the 73rd Congress, the following statements appear relative to Section 9 (d):

"Section 9 (d) is a new provision intended to make it clear that *when the Board orders an election, persons affected by that order cannot come into court until after the election has been held and the Board directs that the employer take some action based upon the results of that election.* At the present time employers are in a position where they can bring court proceedings to enjoin an election even though they have not been directed to take any action based upon the result of a poll. It *seems wiser to limit employers as this bill does to complaining about elections only if the elections are made the basis of some order* directed against them." (Emphasis ours)

(Reported in *Legislative History of the National Labor Relations Act, 1935*, Vol. I, at page 1323, published by the NLRB.)

• • •

"Section 9 (d): This provision makes express the intent of section 10 of the committee draft, that an election is merely a method of determining a particular fact *and is not subject to court review until after the results have been made the basis in whole or in part of an order relative to an unfair labor practice*

(pursuant to sec. 10 of S. 1958 or sec. 8 of the committee draft, respectively). When such order is made the certification and the record of the vote in the election must be included in the transcript required to be filed in court, and will be subject to review as to the facts and the law in the same manner as other findings of the Board." (Emphasis ours)

(Reported in *Legislative History of the National Labor Relations Act, 1935,* Vol. I, at page 1357; published by the NLRB.)

Testifying before the Senate Committee on Education and Labor on March 11, 1935, Senator Robert F. Wagner of New York, the "father" of the National Labor Relations Act, and himself a member of the Senate Committee, gave the following explanation relative to Section 9 (d):

"*Senator Wagner:* A second stumbling block in the pathway of the board has to do with the holding of elections. Under Public Resolution 44, passed last June, any attempt of the Board to hold an election may be contested at the outset in the Federal Courts. As a result, the board, during the last half year, has been able to conduct elections in only 2 cases out of 8. In every case where the company has refused consent to an election, the board has been tied up so indefinitely that not a single controversy has yet been argued in any circuit court of appeals. When the Steel Code was renewed in May 1934, thus averting a great steel strike, it was with the express understanding that elections would be held promptly in the steel industry. But the Steel Board, after months of delay, has had no success in holding elections in the large plants.

"The Chairman: That was under the resolution of last year.

"Senator Wagner: Yes, Public Resolution 44.

"The Chairman: It was not effective in changing the conditions existing under the old law?

"Senator Wagner: That is correct. The present bill cures this difficulty by providing that the Board may conduct elections without anterior court review. An election is nothing but an investigation, a factual determination of who are the representatives of employees. There is no more reason why this should be delayed, than why an investigation by the Board as to whether there has been an unfair labor practice should be held up. But if the Board, after holding an election, gives it practical effect by ordering an employer to deal with representatives as chosen, the whole conduct of the election becomes part of the record reviewable in the courts, just the same as any other action of the Board upon which an order to refrain from an unfair labor practice is based. *This provision insures full court review in any case where an election effects an employer in any substantial way.* But it does not stoop to the folly of holding the Board up twice, once by court review before the election, and then by court review of the order based upon the election."

(Reported in *Legislative History of the National Labor Relations Act, 1935*, Vol. I, at pages 1425-26.)

Except for the omission of the colloquy between the Chairman and Senator Wagner, exactly the same testimony was given by Senator Wagner on March 13, 1935 in his appearance before the Committee on Labor of the House of Representatives during hearings on a parallel bill in the House (H.R. 6288). (Reported in Vol. II at pages 2493-94, *Legislative History of the National Labor Relations Act, 1935.*)

In the debate on the floor of the Senate of Senate Bill No. 1958, Senator Wagner on May 15, 1935, in discussing the history and purpose of the bill said (reported in 79 Cong. Rec. 7569, and in Vol. II, at pages 2331-32, *Legislative History of the National Labor Relations Act, 1935.*):

"Last June, in order to remedy the recognized weaknesses in section 7(a), Congress passed Public Resolution No. 44. The main purpose of that resolution was to facilitate the holding of elections by the National Labor Relations Board; but a fatal loophole has rendered its effect nugatory. In providing that election orders of the Board might be reviewed in the courts prior to the holding of the election itself, the law afforded employers a shield to ward off action indefinitely."

• • •

"The power of the Board to hold elections is considerably clarified. An election is merely a preliminary determination of fact. There is no more reason why it should be subject to anterior court review than why a hearing should be deferred pending judicial action; *but if any election is made the basis for an order of the Board related to an unfair labor practice, the whole procedure embracing the election will be fully reviewable in the appropriate Federal Court.*" (Emphasis ours)

On the same day, May 15, 1935, during the course of Senator Wagner's moving the consideration of Senate Bill No. 1958, the following revealing exchange, as it relates to the purpose and intent of Section 9 (d), took place on the floor of the Senate between Senators Wagner and Robinson (reported in 79 Cong. Rec. 7573, and in Vol. II, at page 2342, *Legislative History of the National Labor Relations Act, 1935.*)

"Mr. Robinson: Mr. President, I do not understand the statement of the Senator from New York that 'all such orders will be fully reviewable by any aggrieved party in the Federal courts.'

"Mr. Wagner: Parties to the controversy, of course.

"Mr. Robinson: Yes; but what is meant by the term 'by any aggreived party'? I am asking for information.

"Mr. Wagner: *Suppose the Board orders an election, which is held. Then a controversy arises* as to who was really elected by a majority of the workers, the company making one contention, and a representative of the workers making another contention. *That controversy will be heard by the Board, evidence will be taken, and then, if either party is dissatisfied with the order of the Board, based upon the supposed violation of a legal right, such party may have a review in the courts.*" (Emphasis ours)

Further reflecting the legislative intent is the following exchange that ensued between Senator David I. Walsh, the Chairman of the Senate Committee on Education and Labor, and Senator Couzens, during the debate on the Senate floor on May 16, 1935 (reported in 79 Cong. Rec. 7658, and in Vol. II, at page 2370, *Legislative History of the National Labor Relations Act, 1935.*):

"Mr. Couzens: The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?

"Mr. Walsh: It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board has no legal authority; the cases have been brought into court, and they are in the courts and undecided. It has been effective where the employer was willing to cooperate with the Board and hold elections; it has been effective in that respect; but where there has been resistance there has been no effect.

"Mr. Couzens: Would the passage of the pending bill remove the appeals to the courts?

"Mr. Walsh: Yes; it would because it limits appeals. *It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.*" (Emphasis ours)

In the House of Representatives, House Report No. 969, 74th Congress, 1st Session (on H.R. 6288, the House counterpart of Senate Bill No. 1958), discussed the history and purpose of Section 9 (d) of the proposed National Labor Relations Act as follows (reported in Vol. II, at pages 2914, 2930-31, *Legislative History of the National Labor Relations Act, 1935*):

> "Any order issued by the Board under the authority of this section (referring to Sec. 2 of Public Resolution 44) may be enforced or reviewed, as the case may be, by petition in the appropriate circuit court of appeals, following the procedure of the Federal Trade Commission Act.
>
> "The weakness of this procedure has that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. Thus, in the *Firestone* and *Goodrich* cases, where the Board ordered elections in November 1934, the cases were not argued in the circuit court of appeals until April; decisions have not yet been rendered, and if the decision happens to be favorable to the Board, the companies will undoubtedly appeal to the Supreme Court, with further inevitable delay. At the present time 10 cases for review of the Board's election orders are pending in the circuit court of appeals. Only three have been argued and none have been decided.
>
> "The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union,

unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review."

• • •

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. *Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c).* The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), *the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and 10 (c).*" (Emphasis ours)

See also later House Report No. 972, 74th Cong., 1st Sess., on Senate Bill No. 1958, containing identical language as above, reported in Vol. II, at pages 2960-61, 2977, *Legislative History of the National Labor Relations Act, 1935;* and later House Report No. 1147, 74th Cong., 1st Sess., on Senate Bill No. 1958, containing identical language as above, reported in Vol. II, at pages 3053, 3073, *Legislative History of the National Labor Relations Act, 1935.*

It is respectfully submitted by counsel for the petitioner that nowhere in the legislative antecedents of Section 9 (d) of the NLRA, as noted aforesaid, is there any expressed Congressional intent to bar judicial review by an aggrieved party, *once an election has been held,* of a subsequent order of the Board based on such election, particularly where the subsequent order of the Board purports to nullify and set aside said initial election on grounds that would constitute unfair labor practices within the meaning of the NLRA. On the contrary, what repeatedly emerges from the various Senate and House Reports, and from the debates on the floor of Congress, is the clear intent of Congress to grant judicial review where, to use the language of Senator Wagner, *"any election is made the basis of an order of the Board related to an unfair labor practice."*

The Judicial Construction Of Section 9 (d) Of The National Labor Relations Act.

In three cases decided during the October Term, 1939, the Supreme Court of the United States passed upon the meaning and intent of Section 9 (d) of the National Labor Relations Act.

In the first of these cases, *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401, 408, 410-411 (1940) the Supreme Court held that a certification by the Board under Section 9 (c) of the NLRA that a particular labor organization is the collective bargaining representative of the employees in a designated unit, is not an order reviewable by the Court of Appeals under Section 10 (f) of the Act, and, citing the legislaitve history of Section 9 (d), said:

> "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not it-

self command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.'" (citing cases)

• • •

"And in considering the provisions of Sec. 9 (d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under Sec. 9 except as incidental to review of an order restraining an unfair labor practice under Section 10. The bill was similarly explained on the Senate floor by the committee chairman (Senator Walsh) who declared: *'It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election.'* 79 Cong. Rec. 7658. The conclusion is unavoidable that Congress, as a result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in Sec. 9 (d)." (Emphasis ours.)

In a companion case, *NLRB* v. *International Brotherhood of Electrical Workers, et al.*, 308 U.S. 413, 415 (1940), where the Board had excluded a particular union local from the ballot on a run-off election, the Supreme Court held that the "direction for an election is but a part of the representation proceeding authorized by Sec. 9 (c) and is no more subject to review under Sec. 10 (f) than is a certification which is the final step in such a proceeding and which we have just held (in *A.F. of L.* v. *N.L.R.B., supra*) Congress has excluded from the review afforded by that subdivision."

In another companiion case, *N.L.R.B.* v. *Falk Corporation*, 308 U.S. 453, 459 (1940), where the Board had directed an election which excluded a company union from

the ballot, after having found the company guilty of unfair labor practices, and where on a petition for enforcement by the Board the Court of Appeals had affirmed the finding of unfair labor practices against the employer but modified the Board's order directing an election so that the alleged company union might, under certain conditions go on the ballot, the Supreme Court, in holding that the Court of Appeals erred in modifying the Board's order, said:

> "Nor can authority for such anticipatory judicial control of election methods be found in Sec. 9 (d) which permits a review only in those cases in which the Board makes an order relating to labor practices found to be unfair as a result of a prior certification of a selected bargaining agent. Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not 'based in whole or in part upon facts certified' as the result of an election or investigation made by the Board pursuant to Section 9 (c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—has been or can be made, so as to invoke the court's powers under 9 (d).
>
> "The fundamental error of the court below lay in its assumption that there was before it 'for final disposition, the matter of the selection of the bargaining agent.' The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted. *There can be no court review under Section 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.*"
>
> "Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9 (d)." (Emphasis ours)

In the recent case of *Boire* v. *The Greyhound Corporation*, 84 S. Ct. 894, 896-97 (1964), the Supreme Court of the United States in holding that the District Courts have no plenary right of review in certification proceedings, that *Leedom* v. *Kyne* was not applicable (358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210), and that judicial review "in such a situation has been limited by Congress to the Court of Appeals, and then only under the conditions explicitly laid down in Section 9 (d) of the Act," reviewed the history of Section 9 (d) of the NLRB, and said:

> *"Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example,* where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate unit. In such a case, Sec. 9 (d) of the Act makes full provision for judicial review of the underlying certification order by providing that 'such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed' in the Court of Appeals.
>
> "That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious . . ."
>
> • • •
>
> "And both the House and the Senate Reports spelled out the thesis, repeated on the floor, that *the purpose of Sec. 9 (d) was to provide 'for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.'* " (Emphasis ours)

In *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 1941, 313 U.S. 146, 154, 61 S. Ct. 908, 85 L. Ed. 1251, the Supreme Court, citing *American Federation of Labor* v. *N.L.R.B., supra*, held:

> "While the ruling of the Board determining the appropriate unit for bargaining is not subject to direct review under the Statute, the ruling is subject to challenge when, as here, a complaint of unfair practices is made predicated upon the ruling."

Since then the various Courts of Appeal have repeatedly granted judicial review under Section 9 (d) of representation proceedings where the order of the Board has either:

(I) Refused to set aside an initial election won by a union, where objections to the conduct of the election were filed by the employer;

See in this regard: *Rockwell Manufacturing Co., Kearney Div.* v. *N. L. R. B.*, 330 F. 2d 795 (C.C.A. 7th—1964); *N. L. R. B.* v. *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.C.A. 10th—1964); *N. L. R. B.* v. *Huntsville Manufacturing Co.*, 203 F. 2d 430 (C.C.A. 5th—1953); *N. L. R. B.* v. *Standard Transformer Co.*, 202 F. 2d 846 (C.C.A. 6th—1953); *N. L. R. B.* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C.C.A. 6th—1944); *Anchor Manufacturing Company* v. *N. L. R. B.*, 300 F. 2d 301 (C.C.A. 5th—1962); *N. L. R. B.* v. *Trancoa Chemical Corporation*, 303 F. 2d 456 (C.C.A. 1st—1962); or,

(II) Has set aside an initial election lost by the union based on objections to the conduct of the election filed by the union, and directed a second election won by the union.

See in this regard: *N. L. R. B.* v. *Realist, Inc.*, 328 F. 2d 840 (C.C.A. 7th—1964); *N.L.R.B.* v. *Capital Transit Co.*, 221 F. 2d 864 (C.C.A., D.C.—1955); *Foreman & Clark, Inc.* v. *N. L. R. B.*, 215 F. 2d 396 (C.C.A. 9th—1954), cert. denied 348 U.S. 887, 75 S. Ct. 207, 99 L. Ed. 697.

The procedural vehicle in each of these cases for judicial review of the Board's order either setting aside or refusing to set aside an initial election has been the refusal or failure

of the employer to engage in collective bargaining pending judicial review, the filing of unfair labor charges against the employer for failure to engage in collective bargaining, the order of the Board finding the employer guilty of unfair labor practices under Section 8(a) (5) of the Act for refusal to bargain collectively, and finally a petition for enforcement by the Board or a petition for review by the employer directed to the Court of Appeals.

As pointed out by the Court of Appeals for the Fifth Circuit in *Anchor Manufacturing Company* v. *N. L. R. B.*, 300 F. 2d 301, 302 (C.C.A. 5th—1962), where the employer had filed objections to the conduct of an election won by the union, which objections had been overruled by the Board, and the employer, seeking judicial review of the Board's order, refused to bargain with the Union pending review:

> "The case is before us upon petition of Anchor Manufacturing Company to review and set aside an order of the National Labor Relations Board and answering petition of the Board for enforcement in full. It is another of those increasingly-frequent cases in which an employer has, or things he has, objections to the conduct of a representation election and, in order to obtain judicial review of his contention, refuses to bargain with a certified union, thus violating Section 8 (a) (5) and (1) of the National Labor Relations Act, 29 U.S.C.A. Sec. 158 (a) (1, 5), and causing a Board order directing bargaining upon request to be issued."

Section 9 of the National Labor Relations Act, as amended, grants no specific authority to the Board to vacate or set aside the results of a representation election. Nor does any other provision of the Act specifically grant or confer such authority upon the Board. In assuming and exercising that power the Board must necessarily rely on Section 6 of the N. L. R. A. (29 U.S. C.A., Sec. 156) which gives the Board the power to make, amend and rescind, "in

the manner prescribed by the Administrative Procedure Act" (5 U.S.C.A. Sec. 1009, *et seq.*), rules and regulations to carry out and effectuate the purposes of the National Labor Relations Act.

Although the Supreme Court of the United States in *N. L. R. B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331, 67 S. Ct. 324, 91 L. Ed. 322 (1946), stated:

> "As we have noted before, Congress has entrusted the Board with a wide degress of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees . . . (citing cases). Section 9 (c) of the Act authorizes the Board to 'take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.' In carrying out this task, of course, *the Board must act so as to give effect to the principle of majority rule set forth in Sec. 9 (a)*, a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that *the Board must adopt policies and promulgate rules and regulations* in order that employees' votes may be recorded accurately, efficiently and speedily;" (Emphasis ours)

the Supreme Court has never precisely defined the circumstances and guidelines under which a representation election may be set aside by the Board.

In *N. L. R. B.* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 434 (C.C.A. 5th—1953), the Court of Appeals said that while it is primarily for the Board to determine whether an election was fairly conducted or was unfairly conducted and should be set aside, that the courts may exact of the Board a standard of reasonableness in the exercise of its discretion.

The Rules and Regulations of the Board (see Appendix to Title 29, U. S. C. A., Sec. 102.69, Series 8, as amended to October 24, 1963), while they provide for the procedural steps for filing objections to the conduct of an election, and for hearing thereon, (which may or may not be ex parte depending on whether substantial and material factual issues exist), make no attempt whatsoever to set forth administrative standards or administrative guideposts of conduct which would constitute grounds for setting aside a representation election. In fact, nowhere in the Rules and Regulations of the Board is any specific authority given or provision made for the setting aside of a representation election because of objections filed to the conduct thereof (cf. with Sec. 102.70 of the Regulations dealing with run-off elections). As a result, the Board's decisions in those cases involving objections to conduct of an election have been on a catch-can, "make-law-as-you-go" basis. Standards of conduct exacted of an employer in a representation election, are not exacted of labor organizations, and courts of review have had occasion to comment on the double standards which the Board, lacking specific statutory or administrative rules setting forth standards or guideposts of conduct which would constitute grounds for setting aside an election, has in practice applied. See, for example, *N.L.R.B.* v. *Trancoa Chemical Corporation*, 303 F.2d 456, 460-462 (C.C.A. 1st—1962).

By reason of the Board's complete failure to proscribe such standards through its Rules and Regulations, it is respectfully submitted, apart from the main theme herein advanced, that a clear right of judicial review also exists in the instant cause under and by virtue of the Administrative Procedure Act, and by reason of the due process requirements of the Fifth Amendment, in view of the fact that the power of the Board to make rules and regulations

is, under Section 6 of the Act, specifically subject to the proscription of the Administrative Procedure Act; and that the Board,—despite the mandate of the Supreme Court in the *A. J. Tower case, supra*, "that the Board must adopt policies and promulgate regulations" in connection with the exercise of the elective franchise in representative cases,—has failed to proscribe appropriate rules and regulations setting forth standards of particular conduct as grounds for setting aside a representation election. This issue has likewise never been directly passed upon by this Court.

In *Foreman & Clark, Inc.* v. *N. L. R. B.*, 215 F. 2d 396, 398 (C.C.A., 9th—1954), cert. denied 75 S. Ct. 207, 348 U.S. 887, 99 L. Ed. 697, the Court in defining "unfair labor practices" said:

> "The National Labor Relations Act, 29 U. S. C. A. Sec. 151, et seq., hereinafter referred to as the Act, potects the employee from 'unfair labor practices,' as defined by statute. *Such practices include, by necessary implication, any 'threat of reprisal or force or promise of benefit.'*" (Emphasis ours)

It is the position of the petitioner herein that the findings and conclusions of the Board (and Hearing Officer) relative to the acts and conduct which the Board has found the employer guilty of as grounds for setting aside the election of October 9, 1963, to-wit:

> (a) That the employer allegedly threatened to take away specific existing benefits (viz. the profit sharing, the Christmas bonus, the $100.00 child bonus, the cafeteria or free lunches) from employees, and to replace existing employees with outside union members, if the union won the election;

(b) That the employer was guilty of an alleged interrogation with reference to an employee's stand on unionization;

(c) That the employer appealed to racial prejudices to discourage unionization in connection with the forthcoming representation election;

constitute as a matter of law, if true, "unfair labor practices" within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended (29 U. S. C. A., Section 158 (a) (1) and (3)).

A rose by any other name is still a rose. Neither the Board or a union should be permitted, by failing to pin the proper label on the employer's alleged "illegal" conduct, to frustrate the clear congressional intent of Section 9 (d) to permit judicial review in a representation proceeding involving the setting aside by the Board of a representation election, where the basis for setting aside the election is conduct which, as a matter of law, would amount to unfair labor practices.

The Board itself has repeatedly recognized that the existence of conduct amounting to an unfair labor practice in connection with representation proceedings is almost invariably a "must" to warrant setting aside an election.

Thus in the 14th Annual Report of the National Labor Relations Board (at page 29, note 10), the Board said:

> "The Board may set aside an election because of conduct on the part of either the employer or a labor organization which does not amount to an unfair labor practice, but in practice it seldom finds that conduct which does not amount to an unfair labor practice nevertheless is sufficiently serious to warrant setting aside the election. See Thirteenth Annual Report, pp. 34-35."

In its 15th Annual Report, at page 82 thereof, the National Labor Relations Board said:

> "The Board, in passing upon the validity of an election, thus applies principles which coincide largely with those upon which the existence of unlawful coercion under section 8 (a) (1) is determined."

The Board has also in the past, reflecting its Rules and Regulations permitting consolidation of proceedings, consolidated representation proceedings on objections to the conduct of an election with unfair labor practice proceedings connected with the election, and such consolidation has uniformily met with the approval of the Courts. See *N. L. R. B.* v. *Dixie Shirt Co.*, 176 F. 2d 969, 970-71 (C.C.A. 4th—1949); *N. L. R. B.* v. *La Salle Steel Co.*, 178 F. 2d 829, 832 (C.C.A. 7th—1949), cert. denied 339 U.S. 963, 70 S. Ct. 996, 94 L. Ed. 1372; and *N. L. R. B.* v. *Minnesota Min. & Mfg. Co.*, 179 F. 2d 323, 325 (C.C.A. 8th —1950), and cases therein cited.

Despite the fact that Sections 102.33 (b) and 102.72 (b) its current Rules and Regulations permit consolidation of proceedings "to effectuate the purposes of the act, or to avoid unnecessary costs or delay," and the sanction and blessing given to such procedure by the Courts of Review, the Board in recent years appears to have taken a new tack on the question of consolidating representation proceedings on objections to the conduct of an election with unfair labor practice proceedings connected with the election, as witness the following policy statement of the Board in its 26th Annual Report (for the fiscal year ending June 30, 1961), at pages 74-75 thereof.

> "The Board will set aside elections because of substantial interference therewith arising from conduct which, in an unfair labor practice proceeding, would also be held violative of the act. But, in such cases,

the interference with the election is found to exist without regard to whether the interfering conduct would be deemed an unfair labor practice in a complaint case. This is because the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to be violative of the act.

"On the other hand, where the conduct alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed, it is Board policy not to inquire into such matters in the guise of considering objections to an election. In such cases, the election process may be protected by the timely filing of charges with respect to the conduct in question."

Compare the above with the Board's 20th Annual Report (at page 66 thereof), where the Board said:

"Objections which in substance amount to allegations of unfair practices likewise will not be considered. Nor will proceedings on objections to an election be stayed pending the disposition of unfair labor practice charges which were not raised as objections to the election."

Petitioner herein respectfully submits that the Board violated the intent and purpose of its own Rules and Regulations, and abused its discretion, in not formally determining in the instant cause, concurrently with the hearing on objections to the election, as requested by repeated motions upon the part of the petitioner employer, the "unfair labor practices" in effect charged as the basis for invalidating the representation election.

The attention of the Court is further called to Section 102.67, subparagraph (f) of the Rules and Regulations of

the National Labor Relations Board which provides as follows:

> "(f) . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Denied the right to review the "illegal conduct" pinned on it by the N. L. R. B. (which conduct, if true, would amount to "unfair labor practices" as a matter of law, regardless of the label which the N. L. R. B. chooses to put or not put on the same), the petitioner employer herein would under the above regulations of the N. L. R. B. be precluded and foreclosed "in any related subsequent unfair labor practice proceeding" from relitigating "any issue which was, or could have been, raised in the representation proceeding." This emphasizes the denial of due process consequences inherent in barring judicial review under the circumstances of this particular case.

A prime and historical policy purpose of Section 9 (d) is that the Board's order directing an *initial* representation election be free of the restraint of judicial review so that employees may have any opportunity to expeditiously express their will in a representation election. That policy objective of Section 9 (d) is attained once such initial representation election is held, and it was not the intent of Congress, as previously pointed out, to bar judicial review where *"any election is made the basis for an order of the Board related to an unfair labor practice"* (see speech of Senator Wagner previously cited), or

where *"the Board has ordered the employer to do something predicated upon the results of the election"* (see remarks of Senator Walsh on the floor of the Senate, previously cited).

It is respectfully submitted that the history and language of Section 9 (d) of the Act indicates and reflects the congressional intent that if elections are to be set aside on grounds that constitute "unfair labor practices," that such action by the Board be subject to judicial review, the same as unfair labor practice cases under Section 10 (f) of the Act, to insure that the "will of the majority" expressed in a representation election is not easily or erroneously cast aside. This is particularly true where, as here, the petitioner employer repeatedly requested a determination by the Board, concurrently with the hearing on objections to the election, of the "unfair labor practices" in effect charged as the basis for invalidating the representation election.

This view is reinforced when one considers the anomalous, prejudicial and dilatory consequences that flow from a policy which would deny "current" judicial review in those cases where, as here, the Board's order setting aside a representation election and directing a new election is predicated on alleged conduct amounting, as a matter of law, to "unfair labor practices."

For one thing, the employer having been found guilty by the Board of conduct in effect amounting to unfair labor practices in connection with the first election, is unable to purge himself thereof by immediate judicial review, is by the Board's own Rules and Regulations (Sec. 102.67 (f)) precluded and foreclosed from challenging such findings in any subsequent unfair labor practice proceeding, and is compelled to stand before his employees in

a second election prejudiced by the onus of presumed guilt upon him, however erroneous and unwarranted.

This is compounded by the declared policy and the decision of the Board in *The Lufkin Rule Co.* case, 147 N.L.R.B. No. 46 (reported in 4 CCH Labor Law Reporter, page 20,993-94), June 5, 1964, wherein the Board ruled that the Regional Director in posting the Notice of the second election state in said Notice of Election that:

> "The elections conducted on . . . . (date) . . . . were set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employee's exercise of a free and reasoned choice."

The prejudicial atmosphere thus cast upon the elective processes of the Board in connection with a second election is patently obvious, and is analogous to those cases where Courts of Review have sustained objections by an employer to the conduct of a union, in connection with an election won by the union, because of fraud or misrepresentation upon the part of the union.

For another thing, without the employer having an opportunity to purge himself of the Board's findings by judicial review *before* a second election, the union is thereby given an unfair and unwarranted propaganda springboard in connection with the second election by being able to hold out to the employees, however unwarranted, that the employer has been found guilty of wrongdoing by the Federal Government acting through the National Labor Relations Board. Attached to petitioner's objections to the Board's Motion to Dismiss, as Exhibits and reproduced in Appendix G to this Petition are current examples of such propaganda issued by the respondent union which speak for themselves.

It is to be further noted that a policy that would deny current judicial review of an order of the Board setting aside a representation election on grounds amounting to unfair labor practices does not create a climate of good labor-management relations, and does not expedite, but in fact delays, the collective bargaining processes. For an aggrieved employer insistent on having his day in court before engaging in collective bargaining, and feeling that he has been prejudiced in having to go into a second election under an erroneous, unwarranted and prejudicial onus of guilt arising from the Board's order setting aside the first election, and that the "will of the majority" of the employees has thereby been distorted, can and will post-electively, after the second election if the union has won the same, obtain what amounts to an ex post facto judicial review of the Board's order stting aside the first election by the simple expedient, as the case of *Anchor Manufacturing Company* v. *N. L. R. B., supra*, points out, of refusing to engage in collective bargaining in order to bring down upon himself the wrath of an unfair labor practice charge by the Board for failure to engage in collective bargaining in violation of Section 8 (a) (5) of the Act.

The holding of a second election under such circumstances, without first affording an immediate right to judicial review of the Board's order setting aside the first election, thus becomes an act of futility and delay which does not expedite or further the collective bargaining processes.

It is respectfully submitted that a policy that would deny current judicial review of an order of the Board setting aside a representation election on grounds amounting to unfair labor practices, put a premium on justice delayed and justice frustrated; puts an employer in the

position of having to become a reluctant law-breaker, by having to refuse to bargain collectively in violation of the NLRA in order to obtain judicial review of the order setting aside the first election; and engenders needless and festering bitterness and antagonisms between labor organizations and management which the finality of judicial review would, in the first instance, but put behind the parties.

The cases of *N. L. R. B.* v. *Realist, Inc.*, 328 F. 2d 840 (C.C.A. 7th—1964), and *Foreman & Clark, Inc.*, v. *N. L. R. B.*, 215 F. 2d 396 (C.C.A. 9th—1954), cert. denied 348 U.S. 887, 75 S. Ct. 207, 99 L. Ed. 697, are both striking illustrations of the added burden put on the administrative processes of the Board and the significant, and undesirable, overall time-gap delay resulting therefrom in resolving the issues, flowing from the present accepted practice of defering judicial review of a Board's order setting aside an initial election lost by the union until, after the second election won by the union, the Board has administratively processed an unfair labor charge against the employer for refusal to engage in collective bargaining in violation of Section 8 (a) (5) of the Act.

In *Realist, Inc., supra*, this is the time sequence revealed by the record:

Date of First Election (to which objections were filed by Union):	July 17, 1962.
Decision and Order of Board vacating 1st election, and directing 2nd election	Nov. 16, 1962.
Date of 2nd Election:	Dec. 4, 1962.
Unfair Labor Charge filed:	Dec. 28, 1962.
Complaint and Notice of Hearing filed:	Jan. 7, 1963.

Final Decision and Order of Board re unfair labor charge (after completion of administrative process of hearing before Trial Examiner, Intermediate Report, Exceptions to Intermediate Report, etc.)	May 13, 1963.
Petition for Enforcement filed by Board	Aug., 1963.
Decision fo Court of Appeals	Feb. 25, 1964.

It will be noted that the time element gap involved between the decision and order of the Board setting aside the first election (Nov. 16, 1962), and the completion of the administrative processes of holding a second election, and processing the unfair labor charge against the employer (May 13, 1963), was approximately six (6) months; and only then did the processes of judicial review come into play. In that same six months time period the processes of immediate judicial review could have been completed by the Court of Appeals (as witness the fact that the petition for enforcement filed in August, 1963, was decided on February 25, 1964), the additional needless burden on the administrative processes could have been avoided, and the usual finality of judicial review by the Court of Appeals completed by May or June, 1963, rather than on February 25, 1964, some 9 or 10 months later. All this without the frustrations and prejudice involved in permitting a second election to be held without first judicially determining the propriety o fthe Board's order setting aside the first election.

In *Foreman & Clark, Inc. supra*, the time sequence revealed by the reported opinion reflects a time element gap between the decision and order of the Board setting aside

the first election (October 21, 1952), and the completion of the administrative processes thereafter (June 3, 1953), of approximately seven and one-half months; and only then did the processes of judicial review come into play.

It is respectfully submitted that the Congressional intent reflected in Section 9(d) of the National Labor Relations Act, as amended, of promoting and fostering industrial peace and good labor-management relations, by affording employees an expeditious opportunity to have a representation election to decide whether or not they want to be represented by a labor organization, is not fostered and is in fact nullified in a case such as this by the policy of non-judicial review contended for by the Board, and that the due process function of judicial review is, in contravention of the clear intent of the Congress, needlessly frustrated and hampered.

The entire record of the hearings on objections to the conduct of the election before the Hearing Officer, being available in this cause, the same as if a Trial Examiner had heard the same, it is respectfully suggested that no practical or justifiable reason exists to warrant defering judicial review in order to go through an exercise of needless futility upon the part of the administrative processes.

Where a Union has *won* a representation election, and the employer's objections to the election based on alleged wrongful conduct by the Union in connection with the election are overruled by the Board, an aggrieved employer seeking judicial review can, consistent with the principles heretofore laid down by this Court (in *American Federation of Labor* v. *N. L. R. B., supra; N. L. R. B.* v. *I. B. E. W., supra; N. L. R. B.* v. *Falk Corp., supra;* and *Pittsburgh Plate Glass Co.* v. *N. L. R. B., supra*), obtain judicial review, *after certification*, without undue delay and without

the anomalous and prejudicial consequences present in the instant case, upon the Board's processing of a Section 8(a) (5) unfair labor practice charge against the employer for failure to engage in collective bargaining. This is as it should be, since the Union having presumptively won the representation election in a proper manner should be entitled to immediate certification.

No such reason exists, however, to bar or defer judicial review where, as here, the Board sets aside a representation election *lost* by the Union and directs a new election on the basis of alleged conduct by the employer constituting unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act. Having lost an election conducted under the auspices of the Board, there is no justification to bar or defer judicial review of the Board's order until such time as the Union wins a second election and is certified, and the Board processes a Section 8 (a) (5) unfair labor practice charge against the employer. This is particularly true of the clear expressed intention of the Congress is to have any meaning, if the due process function of judicial review and the principle of "majority rule" are not to be made a mockery of in Section 9 (d) representation election cases, and if the expeditious and impartial disposition of representation disputes involving objections to conduct of representation elections is to be fostered. It is this basic issue which this Court is here respectfully requested to pass upon for the first time.

Although not in issue in the within cause, it would seem, to round out the picture here consistent with the legislative intent, that a right to immediate judicial review should likewise exist in favor of an aggrieved Union in those comparatively rare instances where (a) the Board overrules

Objections filed by a Union to an election lost by the Union, or (b) where an election won by the Union is set aside and a new election ordered, on the basis of Objections filed by the employer, where the objections are grounded upon the alleged commission of unfair labor practices in connection with the election, if the due process function of judicial review is not to be frustrated.

Without going into the merits of petitioner's Petition to Review filed with the Court of Appeals, which is beyond the scope of the jurisdictional issues here presented, we cannot help but observe the importance of such issues in the light of the dire need for judicial review present in the instant cause. The petitioner herein, who values its good name and its relationship to its employees, has been found guilty of alleged wrongful acts and conduct (amounting in effect to "unfair labor practices") which it did *not* commit, including the canard of racial prejudice. These findings (wherein the Hearing Officer held against the petitioner employer on every single issue, attributed no credibility to any of the 13 witnesses who testified on behalf of the petitioner employer, and found credibility and truth only in the 7 witnesses, including an employee twice admittedly discharged for drunkenness, who testified on behalf of the union), twist, distort and contradict the evidence adduced in the instant cause. These findings also reflect the bias and animus of a Hearing Officer who, in connection with his initial completely inadequate Report and Recommendations on Objections, filed on February 11, 1964 was roundly scolded by the Board in Washington, in its remand order of April 20, 1964, with instructions tantamount to commanding him to read the transcript of evidence and make adequate findings of fact and determinations of credibility.

These findings, it is sad to say, constitute a travesty upon justice and the quasi-judicial functions of the National Labor Relations Board.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the Court of Appeals does have jurisdiction *to currently review* the order of the National Labor Relations Board of August 11, 1964, setting aside the representation election of October 9, 1963 on grounds, in effect and as a matter of law, amounting to "unfair labor practices"; that such exercise of judicial review in the instant cause is consistent and in accordance with the Congressional intent expressed in the legislative history of Section 9 (d) of the National Labor Relations Act, as amended, and is not barred by and is consistent with the judicial interpretation given to Section 9 (d) by the Supreme Court of the United States. It is also respectfully suggested that the exercise of appellate jurisdiction in a case such as this makes good sense, good policy, and good law, and is long overdue.

Wherefore, for the reason hereinabove advanced and because of the fact that the precise jurisdictional issues here presented have never been directly passed upon by this Court, petitioner respectfully prays that this Petition for a Writ of Certiorari should be granted, and, upon hearing, that the judgment order of October 5, 1964, of the Court of Appeals for the Seventh Circuit, dismissing petitioner's Petition to Review for want of jurisdiction, be reversed and this cause remanded to said Court of Appeals with

directions to review the merits of said petitioner's Petition to Review.

Respectfully submitted,

HAROLD S. LANSING,
BERNARD M. KAPLAN,
33 N. LaSalle Street
Chicago, Illinois 60602
Counsel for Jays Foods, Inc., Petitioner.

BLANKSTEN AND LANSING
33 N. LaSalle Street
Chicago, Illinois 60602
Of Counsel

APPENDIX A-1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

October 5, 1964

Before
Hon. F. Ryan Duffy
Hon. Win G. Knoch
Hon. Latham Castle

JAYS FOODS, INC.,
Petitioner,

No. 14760 vs.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION No. 1, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

On consideration of the petitioner's petition and motion to stay order and direction of the National Labor Relations Board setting aside results of a prior representative election, and to enjoin, stay and restrain the National Labor Relations Board from directing or conducting a new election in lieu thereof pending judicial review; opposition of respondent National Labor Relations Board to said petition and motion; motion of the National Labor Relations Board to dismiss the aforesaid petition for re-

view; objections of petitioner to said motion to dismiss the petition for review; petitioner's brief in support of its objections to the said motion of the National Labor Relations Board to dismiss the petition for review; and the response of the National Labor Relations Board to petitioner's objections to the Board's motion to dismiss the petition for review and direction of a representative election.

It Is Ordered that the Board's aforesaid motion to dismiss the petition for review for want of jurisdiction be and it is hereby allowed, and the aforesaid petition for review is hereby dismissed, thus rendering all other pending motions and petitions moot.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, October 9, 1964

Before
Hon. Win G. Knoch, Circuit Judge

JAYS FOODS, INC., *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD and LOCAL UNION No. 1, AMERICAN BAKERY & CONFECTIONERY WORKERS, ETC., *Respondents.*	Petition for review of an order of the National Labor Relations Board.
No. 14760	

On consideration of the motion of counsel for petitioner to stay mandate,

It Is Hereby Ordered that the issuance of the mandate of this Court be stayed for a period of thirty (30) days from this date pursuant to the provisions of Rule 28 of the Rules of this Court.

It Is Further Ordered that the prior order of this Court staying further action by the National Labor Relations Board continue in full force and effect pending the issuance of the mandate in this cause.

APPENDIX A-3

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Friday, October 23, 1964

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Koch, Circuit Judge
Hon. Latham Castle, Circuit Judge

JAYS FOODS, INC.,
Petitioner,
No. 14760 vs.
NATIONAL LABOR RELATIONS BOARD and LOCAL UNION No. 1, AMERICAN BAKERY & CONFECTIONERY WORKERS, ETC.,
Respondents.

Petition for review of an order of the National Labor Relations Board.

On consideration of the motion of the National Labor Relations Board for reconsideration of the order of this Court heretofore entered on October 9, 1964, and the objections of Petitioner thereto,

It Is Ordered that the said order of October 9, 1964 be amended by striking therefrom the last paragraph and substituting therefor the following:

> "It Is Further Ordered that the prior order of this Court staying further action by the National Labor Relations Board continue in full force and effect until (30) days from October 9, 1964."

(Seal)

APPENDIX B

Before

THE NATIONAL LABOR RELATIONS BOARD
(148 NLRB No. 34)

* * (Caption—Case No. 13-RC-9650) * *
(148 NLRB No. 34)

DECISION ON REVIEW, ORDER, AND DIRECTION OF SECOND ELECTION
(Issued August 11, 1964)

Pursuant to a Decision and Direction of Election issued September 23, 1963, by the Regional Director for the Thirteenth Region, an election by secret ballot was conducted on October 9, 1963, under the direction and supervision of the Regional Director in the unit found appropriate. At the conclusion of the balloting, the parties were furnished a tally of ballots, which showed that, of approximately 216 eligible voters, 212 cast valid ballots, of which 84 were for, and 116 were against the Petitioner, and 8 ballots were challenged and 4 were void. Thereafter, the Petitioner filed timely objections to conduct allegedly affecting the results of the election.

In accordance with the Board's Rules and Regulations, the Regional Director conducted an investigation, and on December 13, 1963, issued and duly served upon the parties his Supplemental Decision and Notice of Hearing, ordering that a hearing be conducted before a hearing officer for the purpose of resolving the issues of credibility raised by Petitioner's Objections numbers I-A-3 and I-B, and directing that the hearing officer prepare and serve upon the parties a report containing resolutions of issues of

credibility of witnesses, findings of fact and recommendations of the Regional Director as to the disposition of the said objections.

Pursuant to the above order, a hearing was held beginning on January 14, and ending on January 22, 1964, before Arnold E. Charnin, hearing officer. All parties participated and were given full opportunity to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. On February 11, 1964, the hearing officer issued and served upon the parties his report on objections in which he made findings of fact with respect only to Objection I-A[1] and recommended that the election be set aside and a new election conducted. The Employer on February 18, 1964, filed exceptions to the hearing officer's report.

On March 2, 1964, the Regional Director issued his Second Supplemental Decision and Direction of Second Election, adopting the hearing officer's findings and recommendations. Thereupon, the Employer on March 11, 1964, filed with the Board a Petition for Review pursuant to Sections 102.67 and 102.69 of the Board's Rules and Regulations, Series 8, as amended. The Employer alleged, among other things, that the hearing officer's findings on substantial legal and factual issues were clearly erroneous and that the Regional Director's decision adopting the hearing officer's findings, constituted prejudicial error.

The Board, by order dated April 20, 1964, remanded the proceeding to the aforesaid hearing officer, instructing him to prepare and serve upon the parties a supplemental report containing a discussion of credibility issues and resolutions thereof, together with the reasons therefor,

---

[1] It is evident that the objection referred to as I-A-3 by the hearing officer was intended to encompass all the paragraphs under Objection I-A.

and to make adequate findings of fact and recommendations to the Board as to the disposition of the issues herein, and to forward the same to the Board for further proceedings.

Thereafter, on May 11, 1964, the hearing officer issued and served upon the parties his Supplemental Report on Objections, in which he discussed and resolved credibility issues, made findings of fact and recommended that the Objections I-A and I-B be sustained, that the election held on October 9, 1963, be set aside and a new election directed. The Employer filed timely exceptions to this report and a supplemental brief.

Pursuant to Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Pursuant to the Employer's Petition for Review, the Board hereby grants review. The Board has considered the hearing officer's supplemental report, the Employer's exceptions and briefs,[2] and the entire record in the case, and hereby adopts the hearing officer's findings,[3] conclusions and recommendations that Objections I-A and I-B be sustained, that the election held on October 9, 1963, be set aside and a new election be directed.

---

[2] The Employer has requested oral argument. This request is hereby denied because the record, the exceptions and briefs adequately present the issues and the positions of the parties.

[3] The hearing officer's findings that the Employer interfered with the election involved essentially issues of credibility which were resolved in favor of the Petitioner's witnesses and against the Employer's witnesses. We have examined the record carefully and find no basis for overruling such credibility determinations. Accordingly, we find no merit in the Employer's allegations that by such credibility determinations, the hearing officers exhibited bias and prejudice.

ORDER

It Is Hereby Ordered that the election conducted herein on October 9, 1963, be and it hereby is, set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for the Thirteenth Region shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the notice of second election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof, and and employees engaged in a strike who have been discharged for cause since the commencemnt thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local Union No. 1, American Bakery & Confectionery Workers International Union, AFL-CIO.

Dated, Washington, D.C. Aug. 11, 1964.

.....
Frank F. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

APPENDIX C

Before

THE NATIONAL LABOR RELATIONS BOARD
Thirteenth Region

• • (Caption—Case No. 13-RC-9650) • •

HEARING OFFICER'S SUPPLEMENTAL REPORT ON OBJECTIONS

(Issued May 11, 1964)

The Hearing On Objections in the above-entitled matter was heard before me on January 14, 16, 17, 21 and 22, 1964, at Chicago, Illinois, pursuant to the direction of the Regional Director for the Thirteenth Region of the National Labor Relations Board. On February 11, 1964, the Hearing Officer issued his report in which there were findings of fact with respect to Objections IA-3, and a recommendation that the election be set aside and a new election ordered. On March 2, 1964, the Regional Director issued a Supplemental Decision and Direction of Election adopting the findings and recommendations of the Hearing Officer.

On April 20, 1964, the Board remanded the proceedings to the Hearing Officer, ordering that a supplemental report be prepared and served on the parties, which is to contain a discussion of credibility issues and resolutions thereof, together with the reasons therefor, and to make adequate findings of fact and recommendations to the Board as to the disposition of the issues. The following report is prepared in response to the Board's order.

The Hearing Officer was aware of his great responsibility in making findings of fact in a case such as this,

where many witnesses testified in a different manner regarding a single act transpiring months earlier. Accordingly, the demeanor of the witnesses was studied at the hearing and the record with the conflicting versions was carefully weighed.

I. Objection IA-3

A. The Day Shift Speech:

This Objection refers to remarks alleged to have been made by the Company President, Leonard Japp, in a speech to an assembly of employees during the afternoon of October 7, 1963, two days before the National Labor Relations Board election. The Petitioner presented the following five witnesses who testified to this day shift speech: Ruth Fabing, Mildred McIntyre, Lillian Malley, Willie C. Clifton, and R. D. Roberson. All of these employees, except for Mr. Roberson, were employed by Jay's Foods at the time of the hearing; Mr. Roberson was a dischargee at that time.

Ruth Fabing testified that Mr. Japp notified the employees that there would be an election. He told them that people at other plants would have greater seniority if a union came in and these people could replace them. She testified that Mr. Japp told the employees of the requirements of union membership, including the obligation to pay dues and to go to parades. The parades would be obligatory even it rained "cats and dogs", and the alternative to participating therein was a fine of $25. The employees would have no control of a demand by the union for a raise in dues. The Company president notified the employees that the profit sharing was pretty good but if the union came in, the employees would need a lawyer to find out how much money they had in it. Other

plants had no $100 child allowance or bonus or Christmas gift; here the testimony is vague and doesn't indicate whether Mrs. Fabing recalled Mr. Japp saying that certain benefits were not in existence at other plants, or, that they were things that would be lost if the union came in, or, that already having these benefits, a union was unnecessary. Mrs. Fabing testified that Mr. Japp did not say that the enumerated benefits would be cut out. On some matters Mrs. Fabing appeared clearer than on others. For example, she remembered vividly the subject of parades, dues, seniority, and the pension plan. Indeed, it may have been these matters that left the deepest impression on her during the speech. In areas where she was not sure of what was said by Mr. Japp, she stated that she had no recall. Regarding such matters as plant closing, or Klein's factory, or the hire of Negro employees, Mrs. Fabing indicated that she had no recall of statements being made by Mr. Japp, although some of the questions regarding these matters were asked her by Petitioner's counsel, who called her as a witness, and whom she could surmise would not mislead her to her prejudice. This witness was a union observer during the NLRB election. Mrs. Fabing was generally consistent in her statements on direct and on cross-examination.

Mildred McIntyre testified that Mr. Japp told the assembled employees that employees at other potato chip factories could come and take their places if the union won the election. Employees would be required to march in parades or be fined for one refusal and fined double for a second refusal. She testified that the Company president said that if the union won, the employees would lose their Christmas bonus, profit sharing, and cafeteria. He further stated that if the union won, contributions would be taken from the employees' paychecks and they

would not know why or be able to stop it. She did not recall any comment being made regarding the child bonus, free meals, free coffee breaks, Negro employees, health and life insurance. She recalled Mr. Japp speaking of Klein's and of how that factory had a labor dispute and the plant closed, but that out of love for his employees, Mr. Klein reopened the plant. Mrs. McIntyre testified that Mr. Japp said that the union caused Armour and Swift to move the stockyards to other cities. There is no inconsistency in this witness' statements on direct and cross-examination. She willingly stated a lack of recollection where she could not recall what may have been said about a particular subject. In some areas where Mrs. McIntyre's recollection was vague, she so indicated. Furthermore, the Hearing Officer noted and appreciated the particular care that this witness used to distinguish between the Company saying that it would terminate a benefit, and, a benefit would be lost if the union were chosen. Thus, Mrs. McIntyre stated that Mr. Japp said that the cafeteria would be lost if the union came in, and when asked by the Employer's counsel if the Company said it would terminate this benefit, she responded, no. Mrs. McIntyre was not deceived by the trial tactic so often used by Employer's counsel, that of questioning by paraphrasing an answer in a manner that changes its meaning. Her scrupulousness not to overstep the bounds of truth was manifest throughout her testimony.

Lillian Malley testified that Mr. Japp told the assemblage that if the union came in, the employees would have to donate to charities and deductions would be removed from their paychecks. Mr. Japp said that the employees could have to parade and would be fined by the union for a refusal to do so. She further testified that the Company president said that if operations at other plants were

slow, the union could bring those employees to Jay's to take their places. In her initial testimony, Mrs. Malley recalled no mention of the child bonus or Christmas bonus, but testified that the profit sharing would be lost if the union were chosen, as would the free lunches. Later, she corrected herself and said that she recalled Mr. Japp saying that the Christmas bonus would be taken away. Mrs. Malley further stated that Mr. Japp discussed Klein's and said that Klein's was going to shut down because of a dispute with the union but that Mr. Klein wanted to help his employees She recalled no mention of vacations or holidays, firing employees, Armour or Swift, plant closing or Negro hiring. When she did not recall whether a subject was discussed at the speech of October 7, she so indicated. This witness appeared to be honest and to be careful lest she make a mistake. Although Mrs. Malley stated that she had spoken to Mrs. Fabing and Mrs. McIntyre about the case prior to giving testimony, nowhere does her testimony reflect any planned or coached statements.

Willie Clifton recalled Mr. Japp saying that if the union came in, they could be fired and replaced by other employees with more seniority at other companies. Mr. Clifton testified that he was told that if the union became the bargaining agent, it could deduct money from the employees' paychecks and the employees would not know why. Furthermore, the union would compel the employees to march in parades or be fined. Mr. Cliftor recalled the comments about Klein's that were in the testimony of Mrs. Malley and Mrs. McIntyre. He could recall no comment regarding free lunches, or the cafeteria. or Armours and Swifts, but did recall Mr. Japp saying that the Christmas bonus and child bonus would be lost, and possibly the profit sharing would be discontinued. Mr. Clifton ap-

peared to be a difficult but not untruthful witness. It appeared that he had a remembrance of what was said during the speech that did not allow for paraphrasing. Unless the question was asked in the particular vernacular by which he recalled the answer, or unless he was given the opportunity to narrate freely what was said during the speech, he had difficulty understanding the question posed for him. Mr. Clifton did not recall Mr. Japp saying that if the union won the election, the profit sharing would be cut out, but he did recall Mr. Japp saying there was a possibility that it would be discontinued. He testified that Mr. Japp did not say who would discontinue it, "he just said that there is a possibility that it would be discontinued." It can readily be noted from an examination of the record that the testimony referred to regarding profit sharing is all within the context of a few minutes of cross-examination and demonstrates a desire to be truthful.

R. D. Roberson testified that Mr. Japp said that if the union got in the employees could lose the cafeteria, profit sharing plan, $100 child bonus, and free meals. Employees might be required to go on union parades or be fined for failure to do so. If the union won the election, the employees might be replaced by senior employees from other plants. Mr. Roberson recalled no mention of Armours or Swifts or charitable deductions. From my examination of his demeanor, and the manner in which he responded to questioning, he would appear to be a credible witness.

Mrs. Fabing, Mrs. Malley, Mrs. McIntyre, Mr. Clifton and Mr. Roberson are consistent in their recollection of what was said regarding the obligation to parade, and all testified credibly. Mrs. Fabing, Mrs. McIntyre, Mrs. Malley, Mr. Clifton and Mr. Roberson all testified without contradiction that Mr. Japp indicated that should the union win the election they would be subject to replacement by

employees from other plants. Mrs. McIntyre and Mrs. Malley and Mr. Clifton recalled Mr. Japp's comments regarding Kleins. All the foregoing witnesses but Mr. Roberson testified they were told that sums would be taken out of the paychecks of the employees without their knowledge or consent, should the union win the forthcoming election. Mrs. McIntyre, Mrs. Malley and Mr. Clifton testified that Mr. Japp said that the Christmas bonus would be lost. These same 3 witnesses and Mr. Roberson testified that the Employer said that the profit sharing would be lost. Mrs. McIntyre testified that the cafeteria or free lunches would be lost, as did Mrs. Malley, Mr. Roberson, and Mr. Clifton. Mrs. McIntyre, Mr. Roberson and Mr. Clifton testified that the Employer said the child bonus would be lost. None of these witnesses claimed to recall all the speech of October 7, 1963. Indeed, had the recollection of the witnesses been perfect regarding a speech made in no more than 45 minutes, one afternoon more than three months earlier, the Hearing Officer would be astonished and could only assume that the witnesses had an incredible recall, or that they had memorized a speech and testified by rote. The very limitations in the testimony of witnesses are often the greatest guarantees of their veracity.

The Employer presented eight witnesses, who testified regarding this afternoon speech: Leonard Japp, Theodore Peszynski, Hondrus Smith, Willie Lawrence, Keith Latham, Mildred Machura, Mary Stamborski, and Marie Jenkins.

Theodore Peszynski was the first witness called by the Employer. He is a plant superintendent at the Company. He testified that prior to the speech made by himself and by Leonard Japp, he and Mr. Japp met with Company

counsel, who informed them that they could make no promises and no threats. According to Mr. Peszynski, Mr. Japp made the following comments in his speech: He said that the Company had a variety of benefits, which he listed for the assemblage. He talked about Kleins having a union and how Jay's benefits were better. Mr. Japp said that Kleins was going to discontinue their business but later reconsidered and reopened. This is consistent with testimony of Petitioner's witnesses. He denied that Mr. Japp said that any of the benefits he enumerated would be taken away, but said that Mr. Japp mentioned that the employees already had the benefits and he didn't see why they wanted a union. The Company president informed the employees that they may be required to march in parades and may be assigned picket duty and dues would be taken out of their paychecks like the income tax. Here too, there is little conflict with Petitioner's witnesses. He denied that Mr. Japp said that any employees would be replaced by employees with greater seniority at other Company plants. On cross-examination, Mr. Peszynski added that Mr. Japp mentioned that there would be special assessments if the union won the election. Many of the answers of this witness were elicited by his counsel as specific denials of the matter raised by the Petitioner. On cross-examination, Mr. Peszynski indicated that he is Mr. Japp's brother-in-law.

Mr. Leonard Japp testified that he outlined the Company benefits for the employees and told them that with all the fringe benefits they had he did not see where or what the union had to offer them. He recalled making comments about Kleins, saying that the union had asked for a guaranteed wage and evidently Sunshine Biscuit, who owns Kleins, couldn't pay it and there was a strike. On cross-examination, Mr. Japp added that the plant

was reopened when Mr. Klein interceded for the employees. The majority of Mr. Japp's testimony, like Mr. Peszynski's, consisted of specific denials. He recalled telling his employees that they might be requested to participate in parades and help or participate in picket duties as a union member, and there would be dues and special assessments and a regular checkoff, just like Social Security and withholding tax. He denied mention of a fine for refusal to parade. Mr. Japp remembered that employees raised questions during his night shift and his day shift speech, but does not remember who asked questions or what was asked, although during the day shift speech he initially called on the speakers himself. He could not remember if any of the night shift employees talked against the union. He appeared to have a poor memory regarding the plant superintendent's speech and no memory at all regarding whether his wife spoke. Indeed, Mr. Japp had a finer recall regarding what wasn't said than regarding what was said during his meetings on October 7.

Employee Hondrus Smith quickly exhausted his recollection regarding Mr. Japp's speech by saying that he mentioned the benefits that the employees would be getting because of their cooperation. Thereafter, his testimony on direct examination largely consisted of acknowledging that benefits mentioned by Employer's counsel were discussed, and denying that there was any threat to remove them. He recalled Mr. Japp saying that Mr. Klein would take his business back and that there was a strike there. It was only in the context of a comment about Kleins that Mr. Smith recalled any mention of the word "union." However, when his attention was directed to the fact that Mr. Japp made comments about union duties, he recalled Mr. Japp saying that a union member would have to pull

picket duty. When his attention was directed to union parades, he recalled that Mr. Japp said that employees would be asked to parade. He recalled no mention of special assessments or union dues. On cross-examination, Mr. Smith indicated that he had been the company observer at the NLRB election, but he could not recall how he became the observer. He testified that no one had asked him to testify at the hearing in this matter or discussed with him what he might say; later, in re-direct testimony, Employer's counsel led this witness into admitting that he had discussed the case with counsel two weeks prior to the hearing. Mr. Smith states, contrary to Mr. Japp, that there was no mention of the election in the speech. In one portion of his testimony, Mr. Smith says that he spoke to Mr. Kaplan, Company counsel, on election day, and then, that he did not.

Throughout his testimony, Mr. Smith was engaged in a very unskilled attempt to avoid examination and to guess at the "right" answer. The Hearing Officer cannot credit any of the testimony of this witness.

Mary Stamborski. a floorlady at the Employer, testified that she could recall nothing said during the speech of October 7, 1963. However, as her testimony continued and answers were elicited from her, she recalled matters that no one else could recall, *e.g.*, a 10¢ hourly bonus, and gifts, which were allegedly enumerated by the Employer as benefits that the employees already had. The witness testified largely by denial, simply responding with a "no" to leading questions posed by counsel. After a list of denials of threats had been elicited, the witness was asked if the child bonus was enumerated as a benefit and responded "no", automatically, until led to an admission on that point, and again the denials resumed. She could recall no reference to Kleins, parades, a union member's

duties, picket duties, etc., all matters admitted by Mr. Japp and other witnesses as having been stated during the meeting. The Hearing Officer can only assume that this gentle lady heard little, if anything, of what was said during the October 7 speech.

Marie Jenkins is also a floorlady at the Employer. She did not recall either Mr. Japp or Mr. Peszynski speaking on October 7, possibly, as she says, because she was sitting in the back of the meeting. She did recall Mr. Japp mentioning the benefits that the company had and the forthcoming election, She recalled no mention of Kleins by Mr. Japp, nor parades, nor picket duty, nor union duties, nor Armours or Swifts. She recalled that there was no threat uttered. It appeared that the witness either made no attempt to recall what was said during the October 7 speech, or that she had no recall, for she quickly exhausted her recollection and had to be prodded into making the few affirmative responses she had to the direct examination. I do not credit her testimony.

Willie Lawrence testified that no one but Mr. Japp spoke for a fleeting 5 minutes on October 7, thus effectively excluding Mr. Peszynski and Mrs. Japp, who also spoke. However, he recalled mention of union members having to picket and parade, and pay assessments and dues out of their paychecks. At one point, he stated that he sat far back in the rear of the assembly and may have stepped out for 5 seconds. Mr. Lawrence kept voluntarily repeating that nothing was said "bad" about the union, despite the fact no question was posed. The Hearing Officer was not impressed with the demeanor of this witness. He presented the aspect of one who tried to deny anything "bad" was said rather than one who tried to relate the substance of the speech, although he was given the opportunity to do so.

Keith Latham testified that Mr. Japp mentioned the benefits the employees, had, but did not say that any would be taken away. There would be assessments, picketing, and obligatory parades, and dues taken out of the employees pay. He did not recall whether Mrs. Japp or Mr. Peszynski spoke. He states that Mr. Japp said that Mr. Klein wanted to buy his plant back because he didn't like what was happening there. He recalled no mention of any replacements for Jay's employees, nor any threats. This witness appeared to have a selective memory, recalling certain subjects and having no recall whatsoever regarding others. He did not appear forthright on cross-examination, and oft'times said he did not understand questions, the meaning of which was evident.

Mildred Machura did not remember what Mr. Peszynski said at the meeting of October 7. She could remember that two benefits were mentioned by Mr. Japp, until reminded by Company counsel regarding the others. She was confident that the word "union" was not mentioned, again in conflict with the speech-maker. She admits not remembering half of what was said. Once this witness started to respond with denials, she couldn't stop even regarding admitted matters, *e.g.*, she was positive there was no mention of the duties of union members, and there was no mention of parades. Her evasiveness and temper on cross-examination required repeated warnings both from the Hearing Officer and the Employer's counsel, thus making it impossible to ascribe any weight to her testimony.

Findings and Conclusions:

In assessing the testimony that was given during these proceedings regarding the speech made by Mr. Japp on the afternoon of October 7, 1963, the Hearing Officer makes the following findings and recommendations:

The Hearing Officer was impressed with the credibility of Ruth Fabing, Lillian Malley, Mildred McIntyre, Willie Clifton, and R. D. Roberson, in their recollection that Mr. Japp said to his employees that should the union win the election, they would be subject to replacement by senior employees from other plants, and would, as union members, have the obligation to parade at the request of the union or suffer a fine. Relying on the credibility of these same witnesses, except for Mr. Roberson, who demonstrated no recall regarding this matter, the Hearing Officer finds that Mr. Japp informed the employees that sums would be deducted from their paychecks without their knowledge or consent, should the union win the election.

The foregoing statements constitute material misrepresentations and because of the timing, two days before the election, the Petitioner is prevented from making a substantial reply. A vote based on such representation does not reflect the choice envisaged by the Act. Accordingly, on this basis, the Hearing Officer would recommend that the election be set aside. (*Hollywood Ceramics Company, Inc.*, 140 NLRB 221; *Celanese Corporation of America*, 121 NLRB 303; *Plochman and Harrison*, 140 NLRB 130; *United States Gypsum Company*, 130 NLRB 901; *Steel Equipment Company*, 140 NLRB 1158.)

Based on my observation of the demeanor of the witness and my assessment of their testimony, I find that Mr. Japp told his employees that the profit sharing and the Christmas bonus would be lost should the union become their representative. In making this finding, I rely on the testimony of Mrs. McIntyre, Mrs. Malley, Mr. Clifton, and in regard to the lost profit sharing, also Mr. Roberson. Based on the credible testimony of Mrs. McIntyre, Mrs. Malley, and Mr. Roberson, I further find that Mr. Japp notified his employees that should the union

win the election, they would lose the cafeteria or free lunches.

Having found that the foregoing statements were made by Mr. Japp, I find that these statements tend to interfere with the free choice of the employees in the election of October 9, 1963. (See *Marsh Supermarkets, Inc.*, 140 NLRB 899; *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782; *Southern Materials*, 145 NLRB No. 2; *Hendrix Manufacturing Company, Inc.*, 139 NLRB 397.) Accordingly, it is recommended that this portion of Objection IA-3 be sustained and a new election ordered.

B. The Alleged Interrogation:

Alton Puryear, an employee that had been discharged at the time of this proceeding, testified that on the day of the election, in front of the cafeteria where the polling was to take place, he was approached by Mr. Leonard Japp, who asked him if he was going to "be with him." Puryear said, yes. Mr. Japp denies that this conversation took place.

Findings and Conclusion:

Based on my observation of the demeanor of these witnesses, I find the statements of what transpired as related by Mr. Puryear to be more credible. I believe that he responded honestly and fairly to all of the questions posed to him on direct and cross-examination. Mr. Japp, throughout his testimony on this issue and on other issues in the case, appeared evasive and unsure.

Having found that Mr. Japp interrogated an employee regarding his exercise of the vote, prior to that employee voting in the election, I find that this too tended to interfere with the free exercise of the vote in the election and

constitutes an additional ground for setting aside the election. (See *Marsh Supermarkets, Inc., supra.*)

C. The October 7 Evening Speech:

Only one witness for the Petitioner testified regarding this speech, Joe Louis Dean. The employee testified that Mr. Japp notified the assembled employees that if the union got in there would be a lot of people out of work and people already in the union would replace them. Furthermore, Mr. Japp said that the union had run Armours and Swifts out of Chicago. When Mr. Dean was asked if Mr. Japp said that the same would happen at Jays, he answered, no. Mr. Japp did mention that the free meals, the $100 child bonus and the Christmas bonus would be cut out. He said that no comment was made regarding insurance, or taking away vacation or holidays, or stopping the profit sharing plan. Mr. Japp said that the Company would probably have to make the cafeteria into a supply room, if the union got in. Furthermore, there would probably be strikes, and employees would be out of work part of the time. Mr. Japp also mentioned Kleins.

Employee witnesses Edith Van Wie and Nathaniel Cole Jr. testified on behalf of the Employer, as did Mr. Japp and Mr. Peszynski, whose testimony has been analyzed heretofore. Mr. Cole testified that Mr. Japp said that you might have to march in parades or do picket duty, and dues would be deducted from your pay the same as insurance would be, if you joined the union. Mr. Cole said that there was no threat to cut out a benefit. He further stated that he heard Mr. Japp say that the employees should vote as they wished and that he didn't see what additional benefits a union could give.

Mrs. Van Wie testified that she recalled mention of Armours and Swifts, but by employees, and of "Kleins," also by employees. Mr. Cole had said that there was no talking, no noise during the meeting, and he was sure neither of the two foregoing subjects was mentioned. Mrs. Van Wie further recalled Mr. Japp saying that if a union were in, they might be asked to picket or parade, and that union dues would be taken out of their pay like insurance, and also that there would be further assessments. Mr. Cole testified that there was no mention of any special assessments.

Findings and Conclusions:

Based on my observation of the demeanor of these witnesses. I would credit Mr. Dean, who testified in response to non-leading questions, and testified in a forthright manner. I do not credit Mr. Cole, whose memory appeared to be especially bad, nor can I credit Mrs. Van Wie.

Accordingly, I find that during his evening speech of October 7, 1963, Mr. Japp said that if the union came into the plant, the employees would lose their free meals, $100 child bonus, and Christmas bonus, and that the cafeteria would probably have to be turned into a supply room. I also find that Mr. Japp notified the employees that they could be replaced by employees from other plants, who were already in the union. Having made the foregoing findings, I conclude that these comments by Mr. Japp interfered with the free choice of the employees in the election of October 9, 1963, and that the election should be set aside therefor.[1]

---

[1] The law on this matter has already been amply considered by the Hearing Officer in his findings and conclusions on the day shift speech.

II. Objection IB

This Objection alleges that certain white female employees stated that they had been informed by their floorladies that if the Union got in, the Union would require the Company to hire colored women. There is issue with regard to whether these floorladies are supervisors within the meaning of the Act, and there is issue with regard to whether such statements were made.

A. Supervisory Status

The witnesses are fairly consistent in their testimony regarding the duties of the floorladies. There are four assembly lines in operation during the day shift and six floorladies. On assembly line A, there are 2 floorladies and 24 employees; on line B there are 20 employees and 1 floorlady; on line C there are 20 employees and 2 floorladies; on line D there are 6-12 employees and 1 floorlady. The Employer contends that Albert Stamp, a foreman, supervises the whole of this department, which includes all four lines. There are two floorladies and twenty-five employees on the night shift in this department; Albert Stamp is not present on this shift.

Mr. Stamp states that the floorlady is in charge of quality control, with the obligation to check the weight of the packaged products being produced, and to see that packages are in good shape. Each morning the floorlady obtains from Mr. Stamp the production schedule for that day. She keeps a record of the production on her line, which is completed at a desk that is set aside for that purpose near the line on which she works.

In keeping with her obligation to maintain quality of the product, and apparently to see that the production schedule is met, the floorlady can shut a machine if she

feels that the weights of the product coming from the machine are not correct, or the machine is running too fast. She can correct and instruct a girl in the proper way to perform her job. Should an employee continue to perform improperly, or be unable to follow or refuse to follow the instructions of the floorlady, the employee may be brought to the attention of Mr. Stamp, who has the power to fire. The floorlady has the power to place an employee on a particular machine and to reassign that employee when necessary; although the Employer would contend that this power comes under the direction of Mr. Stamp, so does the operation of the whole department. It is evident that Mr. Stamp is not consulted every time an employee is moved or given instruction or correction.

The floorlady does not have the power to hire, fire, layoff, or recall employees. The floorlady receives a wage that is approximately 30¢ more than that of the highest paid production worker. She is hourly paid as is the production employee. She wears the same uniform and shares the same plant facilities as the production employee.

Floorladies check the time sheets and time cards of the employees. On occasion, the plant superintendent will tell a floorlady about the quality of an employee's work and expect the floorlady to instruct the girl correctly. Mr. Stamp says that he recalls one occasion when a floorlady reprimanded an employee for not keeping the floor clean. On another occasion, says Mr. Stamp, the floorlady recommended discipline for a girl who was taking excessive time off her job, and the discipline was accorded.

Mary Stamborski, a floorlady, says that on occasion a girl would report another employee to her and then she says ". . . if you have time to watch, how can you tell that one ain't doing her work." Marie Jenkins, a floor-

lady, says that she does not report a girl to Mr. Stamp unless they do the wrong thing too often. She says girls ask her for permission to go to the washroom. If a girl complains that a machine needs repairs, the floorlady will shut down a machine and inspect it and determine if she should call a mechanic.

Employees McIntyre, Malley and Fabing testified credibly that the floorlady places the girls in the mornings, assigning each girl a spot and that she can reassign girls. Mrs. Fabing says that she was once reprimanded by a floorlady for leaving two potato chip bags out of a box in which they should have been placed. Mrs. Fabing recalled other instances where floorladies told employees that they should work or else punch out and go home. On one occasion, she recalled a floorlady shaking a girl and reporting the employee to Mr. Stamp with the recommendation that she was an agitator and should be fired; this employee quit.

Based on the foregoing, the Hearing Officer would find the floorlady to be a supervisor within the meaning of Section 2(11) of the Act.

The floorlady has the authority to discipline and to effectively recommend the discipline of employees.(*Maxam Buffalo, Inc.*, 139 NLRB 1040; *Alto Plastics Manufacturing Corporation*, 136 NLRB 850) She has the authority to responsibly direct employees. (*Maxam Buffalo, Inc., supra*) She receives more pay than the highest paid employee (*Remington Rand Corp.*, 141 NLRB 1052; *Lamar Hotel*, 137 NLRB 1271). She receives production orders from the plant superintendent's office (*Inland Motor Corporation of Virginia*, 138 NLRB 516), and she must see that the production is met. She is responsible for the efficient operation of her assembly line (*Inland Motor Corporation of Virginia, supra; National Gypsum Co.*, 139 NLRB 916).

The ratio of employees to supervisors would be unreasonable (100 to 1) were the floorladies not supervisors (*National Gypsum Co., supra; Applied Research, Inc.*, 138 NLRB 870). There would be no supervision present for 25 employees on the night shift if the floorlady is not a supervisor (*National Gypsum Co., supra*); the Hearing Officer is not prepared to assume that the night shift production department is given virtual autonomy.

B. The Alleged Statements Made by the Floorlady

Ruth Fabing states that in about August 26, 1963, Marie Jenkins said to employees Malley, McIntyre, herself, and another employee,—you girls asked for it—you signed cards to have an election—you are going to have to start working with colored women, and some of you will start to holler then. Mrs. McIntyre recalled this conversation as taking place after Labor Day, within a week after the filing of the NLRB petition, and says that Mrs. Jenkins said that if the Union was in, the Company would hire colored girls, and they would have to work and eat with them.

Mrs. Lillian Malley recalled the conversation as having taken place in mid-September, 1963, and Marie Jenkins as having said that if the Union was in, the Company would have to hire colored girls and we would have to work and eat with them.

It appears that the Employer has not had a female Negro employee for about 20 years. Although Mrs. Jenkins denies the conversation regarding the hire of Negroes, she states that she heard other employees discuss this matter. Mrs. Jenkins testified initially that she did not recall who engaged in these discussions and then that the speakers were employees on her line. The Hearing Officer,

having observed the demeanor of the witnesses, would credit the employee witnesses and find that the floorlady, who is a supervisor within the meaning of Section 2(11), informed employees that should the Union win the election, the Employer would hire female Negro employees, and the employees would have to work with them. This appeal to racial prejudices tends to interfere with the free choice of the employees in the election and constitutes an additional ground for the setting aside of the election.

> "appeals to racial prejudice on matters unrelated to the election issues or to the Union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election." (*Sewell Manufacturing Company*, 138 NLRB 66, 71)

III. Recommendation

Having found herein that sufficient evidence exists for sustaining Petitioner's Objections IA-3 and IB. it is hereby recommended that the results of the election held on October 9, 1963, be set aside and that a new election be held.

Dated at Chicago, Illinois, this 11th day of May, 1964.

/s/ Arnold E. Charnin
Arnold E. Charnin, Hearing Officer
National Labor Relations Board
Thirteenth Region
176 West Adams Street
Chicago, Illinois 60603

APPENDIX D

Before

THE NATIONAL LABOR RELATIONS BOARD

Thirteenth Region

* * (Caption—Case No. 13-RC-9650) * *

HEARING OFFICER'S REPORT

AND

RECOMMENDATIONS ON OBJECTIONS TO ELECTION

(Issued February 11, 1964)

Pursuant to a Decision and Direction of Election issued September 23, 1963, by the Regional Director for the Thirteenth Region, an election by secret ballot was conducted on October 9, 1963, under the supervision of the said Regional Director. At the conclusion of the election, the parties were furnished with a Tally of Ballots showing that there were 216 eligible voters; that 4 of the ballots cast were void; that 84 ballots were cast for Petitioner; that 116 ballots were cast against Petitioner; and that 8 ballots were challenged, a number insufficient to affect the results of the election.

On October 16, 1963, the Petitioner filed timely Objections to conduct affecting the results of the election, copies of which were duly and timely served upon the Employer.

On December 13, 1963, after an investigation of the Objections had been conducted in accordance with the Board's Rules and Regulations, the Regional Director issued his

Supplemental Decision and Notice of Hearing. Pursuant to said Supplemental Decision, a Hearing Officer was appointed for the purpose of conducting a hearing with regard to Petitioner's Objections Numbers IA-3 and IB.

The Regional Director directed the Hearing Officer to prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact and recommendations as to the disposition of the said Objections.

Pursuant to notice, a hearing was held on January 14, 16, 17, 21, and 22, 1964, at Chicago, Illinois, before Arnold E. Charnin, the duly designated Hearing Officer. At this hearing, the Petitioner, the Employer, and the Regional Director appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

Upon the entire record of the case, from my observation of the demeanor and manner of the witnesses and all the testimony adduced at the hearing, I make the following findings and recommendations:

Objection IA-3:

In the afternoon of October 7, 1963, Leonard Japp, the company president, made a speech to a gathering of employees. During the course of that speech, Mr. Japp notified the employees of various benefits they had received from the Employer. Mr. Japp mentioned the Christmas bonus, the free meals, and the $100 child bonus. He notified the employees that should the Union get in, all these benefits would be taken away.

During the course of this same speech, Mr. Japp notified the employees of the obligations they would incur as union members. He stated that the employees would be required to participate in union parades, and be fined for failure to do so. He stated that union deductions would be made from the pay of the employees, and the employees would not know the purpose of the deductions nor would they be able to say anything about them.

Mr. Japp informed his employees that should the Union become their representative, the employees would be subject to replacement by employee-union members of other employers.

Conclusions and Recommendations:

It is concluded that the remarks of the Employer at the afternoon speech of October 7, 1963, interfered with the free choice of the employees in the election of October 9, 1961.[1] Accordingly, it is recommended that the Petitioner's Objection No. IA-3 be sustained and a new election be ordered.

Having recommended that this Objection be sustained, the Hearing Officer will make no findings or recommendations with regard to the other Objections of Petitioner.

Dated at Chicago, Illinois, this 11th Day of February, 1964.

/s/ Arnold E. Charnin,
Arnold E. Charnin, Hearing Officer

---

[1] *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782; *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

APPENDIX B

Before

THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

• • (Caption—Case No. 13-RC-9650) • •

ORDER REMANDING PROCEEDING TO HEARING OFFICER

(Issued April 20, 1964)

On October 9, 1963, pursuant to a Decision and Direction of Election issued on September 23, 1963, an election by secret ballot was conducted in the above-entitled proceeding, under the direction and supervision of the Regional Director for the Thirteenth Region. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Rules and Regulations of the Board.

The tally of ballots shows that there were approximately 216 eligible voters and that 212 ballots were cast, of which 84 were for the Petitioner, 116 were against the Petitioner, 8 were challenged, and 4 were void.

On October 16, 1963, the Petitioner filed timely objections to conduct affecting the results of the election. After an investigation, the Regional Director on December 13, 1963, issued his Supplemental Decision and Notice of Hearing, ordering that a hearing be conducted before a Hearing Officer for the purpose of resolving the issues of credibility raised by Petitioner's objections numbers 1-A-3 and 1-B, and directing that the Hearing Officer thus designated prepare and serve upon the parties a

report containing resolutions of issues of credibility of witnesses, findings of fact and recommendations to the Regional Director as to the disposition of said Objections.

Thereafter, on February 11, 1964, after a hearing on due notice to the parties, Arnold E. Charnin, the duly designated Hearing Officer, issued his report in which he made findings of fact with respect to Objection 1-A-3, and recommended that the election be set aside and a new election conducted. The Employer on February 18, 1964, filed exceptions to the Hearing Officer's report.

On March 2, 1964, the Regional Director issued his Second Supplemental Decision and Direction of Second Election, adopting the Hearing Officer's findings and recommendations, setting aside the election conducted on October 9, 1963, and directing that a second election be held herein. Thereupon, the Employer on March 11, 1964, filed with the Board a Petition for Review pursuant to Sections 102.67 and 102.69 of the Board's Rules and Regulations, Series 8, as amended.

The Employer alleged, amoung other things, that the Hearing Officer's findings on substantial legal and factual issues were clearly erroneous on the record and that with the Regional Director's decision adopting the Hearing Officer's findings, constituted prejudicial error. The Employer, therefore, requested, inter alia, that the Hearing Officer's findings and recommendations sustaining Petitioner's objection 1-A-3, which were adopted by the Regional Director, be overruled and that the Board certify the results of the election held on October 9, 1963.

The Board having duly considered the matter, and having concluded on the record before it that the report of the Hearing Officer did not, contrary to the directions of the Regional Director, discuss and resolve questions of

credibility, make adequate findings of fact and recommendations as to the disposition of the issues herein. Accordingly,

It Is Hereby Ordered that this proceeding be, and the same hereby is, remanded to the aforesaid Hearing Officer to prepare and serve upon the parties a supplemental report containing a discussion of credibility issues and resolutions thereof, together with the reasons therefor, and to make adequate findings of fact and recommendations to the Board as to the disposition of the issues herein. Within 10 days from the date of issuance of such report, which shall be forwarded to the Board for further proceedings, any party may file with the Board in Washington, D.C., an original and six copies of exceptions thereto. Immediately upon the filing of such exceptions the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the Regional Director.

Dated, Washington, D.C., April 20, 1964.

By direction of the Board:

/s/ George A. Leet
Associate Executive Secretary

APPENDIX F.

Statutes Involved.

Section 6 of the National Labor Relations Act, as amended, (29 U.S.C.A., Sec. 156), provides as follows:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."
>
> • • •

Section 8 of the National Labor Relations Act, as amended, (29 U.S.C.A., Sec. 158) provides in pertinent part:

> "(a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 • • •;
>
> • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •
>
> • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) • • •.
>
> • • •

Section 9(c) of the National Labor Relations Act (29 U.S.C.A. Sec. 159 (c)), provides in pertinent part:

> "(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 9(d) of the National Labor Relations Act (29 U.S.C.A., Sec. 159 (d)), provides in pertinent part:

"(d) Whenever an order of the Board made pursuant to section 10(c) * * * is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 10 * * *, and thereupon the decree of the court enforcing, modifying, or setting aside in

whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

• • •

Section 10 of the National Labor Relations Act, as amended, (29 U. S. C. A., Sec. 160) provides in pertinent part:

"(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. • • •

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."

• • •

Section 10 of the Administrative Procedure Act (5 U. S. C. A. Sec. 1009), as amended, provides in pertinent part:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved

by such action within the meaning of any relevant statutes, shall be entitled to judicial review thereof.

• • •

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

• • •

Rules And Regulations Of NLRB Involved

Section 102.67, subparagraph (f) of the Rules and Regulations of the National Labor Relations Board, Series 8 (Appendix to Title 29 U.S.C.A., Reg. Sec. 102.67 (f), provides as follows:

"(f) The parties may at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8 (Appendix to Title 29 U.S.C.A., Reg. Sec. 102.69) provides in pertinent part:

§ 102.69 **Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.**

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as

choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties, and the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

* * *

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to § 102.62(b) the regional director shall prepare and cause to be served upon the parties a report on ob-

jections or challenged ballots, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board at Washington, D. C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension made not later than 3 days before such exceptions are due in Washington, D. C., with copies of such request served on each of the other parties, any party may file with the Board in Washington, D. C., seven copies of exceptions to such report which shall be printed or otherwise legibly duplicated. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (1) issue a report on objections or challenging ballots, or both, as in the case of a consent eelction pursuant to § 102.62 (b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative inappropriate action or certifying the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraphs (c) and (e) of this section; if

the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

(d) Any hearing pursuant to this action shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report. A copy of such exceptions shall immediately be served upon each of the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(e) (1) In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwithupon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the

provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow, file with the Board in Washington, D. C., seven copies of exceptions to such report, which shall be printed or otherwise legibly duplicated except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of § 102.46 of these rules shall govern with respect to the filing of exceptions to the trial examiner's decision. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to suuch report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.67.

• • •

(f) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objections to the conduct of the election or conduct affecting the results of the election, any

report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other documents submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

• • •

APPENDIX G

SPECIAL NEWS BULLETIN

VICTORY FOR LOCAL UNION #1 A.B.C. AFL-CIO

8/20/64

EMPLOYEES OF JAY'S FOODS, INC.

* * * * * * * * * * *

The United States Government has officially taken its stand in favor of the Union's position!

The Government's findings were that Mr. Japp and Company were found guilty of violating your rights under the National Labor Law.

The Labor Board has set aside the results of the October 9, 1963 election, because of the "illegal conduct and tactics" which were used by management.

Therefore, a new election will be held in the very near future so that you will be allowed this time, to vote your "own free will", in voting for Union representation, without any interference from Mr. Japp or his Supervisors.

As soon as the new election is ordered, and the date is set by the National Labor Relations Board, an Agency of the United States Government, we will notify you immediately.

We will be looking forward to meeting all of you again.

Local Union No. 1, of the
American Bakery & Confectionery
Workers' International Union,
AFL-CIO.

Organizing Committee-- Jay's Foods, Inc.,

oaiu-28
afl-cio
8-19-1964

COMPANY CHALLENGES ....
??? GOVERNMENT ???

8-28-64

EMPLOYEES OF JAY'S FOODS, INC.

* * * * * * * * * * *

Your employer through his attorney will not accept the final decision, of the Federal Government, however your right to vote cannot be halted in this great land of ours.

The Federal Government and Local Union No. 1, ABC, AFL-CIO, are taking immediate steps to assure your right to cast a vote for UNION REPRESENTATION.

DOES YOUR EMPLOYER REALLY HAVE YOUR WELFARE AND INTERESTS AT HEART?

Or is he fighting to hold off an election, because he knows the many benefits you would gain through UNION REPRESENTATION?

Or is your employer only concerned about his own interests?

Don't worry about your employer. he can take care of himself, but by his actions, he is delaying your right to take care of YOURSELF and YOUR FAMILIES.

Local Union No. 1, of the
American Bakery & Confectionery
Workers' International Union,
AFL-CIO

ORGANIZING COMMITTEE -- JAY'S FOODS, INC.

ocaiu-28
afl-cio
8/28/64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 638

JAYS FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND LOCAL UNION NO. 1, AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On October 9, 1963, the National Labor Relations Board conducted an election to determine whether certain employees of the petitioner company desired to be represented by respondent Union. The Union lost the election, but filed timely objections alleging that the Company had engaged in conduct that affected the results of the election. After investigation, the Regional Director on December 13, 1963, ordered a hearing to resolve issues of credibility raised by the Union's objections. (Pet. 5a.)

724-815—64

A hearing was held at which all parties participated, and, on February 11, 1964, the hearing officer recommended that the election be set aside and that a new election be conducted (Pet. 31a–33a). This report was adopted by the Regional Director, but, upon the Company's petition for review, the Board remanded the proceeding to the hearing officer for further findings and for a discussion of the credibility issues (Pet. 34a–36a). On May 11, 1964, the hearing officer, in a Supplemental Report on Objections (Pet. 10a–30a), found, *inter alia*, that the Company president had threatened to withdraw benefits and to commit other reprisals if the Union were selected, that this and other conduct affected the election results, and that the first election should be set aside and a new one held. The Company filed a petition for review with the Board, which, on August 11, 1964, adopted the examiner's decision (Pet. 5a–9a).

The Company then filed in the court of appeals a petition for review of the Board's order directing a second election. On the Board's motion the court dismissed the petition for want of jurisdiction (Pet. 1a–2a).[1]

The court of appeals' ruling was plainly correct, and there is no occasion for review by this Court. It is well settled that Board orders directing a representation election are not "final orders" subject to direct review by the courts of appeals under Section 10 of the Act (*American Federation of Labor* v. *National*

[1] However, the court, which had stayed the second election pending its decision, continued the stay until November 6, 1964 (Pet. 3a–4a).

Labor Relations Board, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413)[2] and this Court has "consistently refused to allow direct review of such orders in the Courts of Appeals * * *" (*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479). Under the statutory scheme, such orders may be reviewed only in connection with review of a Board order entered in an unfair labor practice proceeding growing out of a refusal to bargain with a union selected in the election. See Section 9(d) of the Act (Pet. 38a–39a). In other words, if the union in this case should win the second election, if the company should refuse to bargain with it, and if the Board ultimately should direct the company to do so, the company then could challenge the second election as an incident to judicial review of the order to bargain. It cannot, however, obtain direct review in the court of appeals of the order directing the election.

There is no basis for petitioner's contention (Pet. 20–21, 22, 30, 42) that the foregoing rule applies only to the first election that the Board directs but not to a subsequent election. Neither the language of the Act nor the decisions announcing the rule support or even suggest such a limitation, and the basic policy underlying the rule—avoidance of the delay that permitting direct review of Board election orders would

[2] Section 10(f) of the Act provides that any "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the court of appeals. In the cases cited *supra*, the Court held that the term "final order" refers to an order issued at the culmination of an unfair labor practice proceeding under Section 10 of the Act.

cause—is equally applicable in both situations. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 409–412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477–479.

Equally erroneous is petitioner's theory (Pet. 19, 30, 38–41, 43) that it could have secured immediate judicial review of the Board's election order if the Board, in a consolidated representation and unfair labor practice proceeding, had held that the conduct which was the basis for setting aside the first election also constituted unfair labor practices. For even in that case the company, although it could directly challenge the unfair labor practice finding, could not simultaneously obtain review of the order directing the election. For the latter order may be reviewed only when it forms the basis of—and not merely because it is entered in conjunction with—an order directed against unfair labor practices. *National Labor Relations Board* v. *Falk Corporation*, 308 U.S. 453. Accord: *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 832, n. 1 (C.A. 7), certiorari denied, 339 U.S. 963; *Hendrix Mfg. Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 106 (C.A. 5); *Big Lake Oil Company* v. *National Labor Relations Board*, 146 F. 2d 967 (C.A. 5); *National Labor Relations Board* v. *Plaskolite, Inc.*, 309 F. 2d 788 (C.A. 6); *National Labor Relations Board* v. *Thompson Products*, 162 F. 2d 287, 294, 301 (C.A. 6); *National Labor Relations Board* v. *J. L. Brandeis & Sons*, 145 F. 2d 556 (C.A. 8); *DuPont & Co.* v. *National Labor Relations Board*, 116 F. 2d 388, 401 (C.A. 4), certiorari denied, 313 U.S. 571;

Bonwit Teller, Inc. v. *National Labor Relations Board,* 197 F. 2d 640 (C.A. 2), certiorari denied, 345 U.S. 905.

Finally, the Administrative Procedure Act (5 U.S.C. 1000, *et seq.*) does not empower the court of appeals to review a Board representation order, where the National Labor Relations Act, as construed by this Court, precludes such review. See *Timken-Detroit Axle Company* v. *National Labor Relations Board,* 197 F. 2d 512, 513 (C.A. 6); *Ohio Power Company* v. *National Labor Relations Board,* 164 F. 2d 275 (C.A. 6); *Cameron & Franks* v. *National Labor Relations Board,* 207 F. 2d 775 (C.A. 6); *Ove Gustavsson Contracting Co.* v. *Floete,* 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAWRENCE M. JOSEPH,
Attorney,
National Labor Relations Board.

NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964